Supreme Court, U.S.
FILED
NOV 12 1991
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91-796

No. 91-___

In The

Supreme Court of the United States

October Term, 1991

NELL A. CAMMACK, et al.,

Petitioners,

v.

JOHN WAIHEE, et al.,

Respondents.

Petition For Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether the enactment of a state holiday on Good Friday violates the Establishment Clause when the legislature stated that the holiday was justified "in view of the religious significance of Good Friday"?

2. Whether a federal court may "revise" legislative intent by substituting its own statement of purpose for a legislature's express statement of its actual purpose?

3. Whether the state's observance of a legal holiday on a day of exclusively religious significance – the day that commemorates the crucifixion of Jesus Christ – conveys a message of endorsing the Christian faith, in violation of the Establishment Clause?

LIST OF PARTIES

The petitioners in this case are:

NELL A. CAMMACK

GENIE LUCAS

DOUGLAS PAUL ROOT

CAROLYN L. STAPLETON

MICHELE WALLACE

The respondents in this case are:

JOHN WAIHEE, in his capacity as Governor of the State of Hawaii

ALFRED LARDIZABAL, in his capacity as Director of Personnel Services of the State of Hawaii

FRANK F. FASI, in his capacity as Mayor of the City and County of Honolulu

JEREMY HARRIS, in his capacity as Managing Director of the City and County of Honolulu

LORETTA K. FUKUDA, in her capacity as Director of Civil Service of the City and County of Honolulu

UNITED PUBLIC WORKERS, LOCAL 646, AFSCME

HAWAII GOVERNMENT EMPLOYEES' ASSOCIATION, LOCAL 152, AFSCME*

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*The omission of the Hawaii Government Employees' Association from the list of appellees in the reported opinion at 932 F.2d 765 (9th Cir. 1991) was inadvertent. *See* 673 F. Supp. 1524 (D. Haw. 1987) (complete list of parties).

LIST OF PARTIES – Continued

HAWAII STATE TEACHERS ASSOCIATION

UNIVERSITY OF HAWAII PROFESSIONAL ASSEMBLY

HAWAII FIRE FIGHTERS ASSOCIATION, LOCAL 1463, IAFF

STATE OF HAWAII ORGANIZATION OF POLICE OFFICERS

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Petition For Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

PETITION FOR WRIT OF CERTIORARI

Petitioners Nell A. Cammack, Genie Lucas, Douglas Paul Root, Carolyn L. Stapleton, and Michele Wallace respectfully request that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Ninth Circuit in this case on August 9, 1991 (amending the opinion of April 30, 1991).

OPINIONS BELOW

The amended opinion of the court of appeals is reported as *Cammack v. Waihee*, 932 F.2d 765 (9th Cir. 1991), and is reprinted in Appendix A. The order and

dissents in the denial of the petition for rehearing and suggestion for rehearing en banc are reported at 944 F.2d 466 (9th Cir. 1991) and are reprinted in Appendix C. The opinion of the district court is reported at 673 F. Supp. 1524 (D. Haw. 1987) and is reprinted in Appendix B.

JURISDICTION

The judgment of the Court of Appeals for the Ninth Circuit was entered April 30, 1991. Petitioners filed a timely petition for rehearing and suggestion of rehearing en banc on May 13, 1991; the petition was denied August 13, 1991. This Court's jurisdiction is invoked pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS

The Establishment Clause of the First Amendment to the Constitution provides as follows: "Congress shall make no law respecting an establishment of religion . . . . " Appendix D contains the full text of Hawaii Revised Statutes section 8-1 (which codifies Hawaii's annual state holidays, including the Good Friday holiday at issue here).

STATEMENT OF THE CASE

"The holly and the ivy, jingling bells, red-nosed reindeer, and frosty snowmen this is not. What this case *is*

about is Hawaii's endorsement, by means of a state holiday, of a day thoroughly infused with religious significance alone." A50 (emphasis in original). With these words, Judge Nelson in her dissenting opinion below aptly described the central issue in this case, which challenges the Good Friday holiday in Hawaii. The significance of Good Friday was described in *Griswold Inn, Inc. v. State*, 183 Conn. 552, 441 A.2d 16, 17 (1981), as follows:

> Good Friday is an annual day of holiness [,] . . . commemorat[ing] the death by crucifixion of Jesus Christ, the founding inspiration of [the Christian] faith, whose death is by [Christians] believed to constitute an act of atonement for human transgressions against [God's] commandments[.]

The religious significance of the Good Friday holy day was not incidental to its enactment as a state holiday in Hawaii. In fact, the twelve-year effort to establish the Good Friday holiday was successful only when the proponents set forth persuasive religious reasons for its enactment. At the same time, the constitutional issue presented by this case is not unique to Hawaii. Twelve other states have also established Good Friday as a public holiday. *See* A11 & n.2 (citing state statutes).

Legislative History

In 1929, the Hawaii Territorial Legislature considered a bill "to have Good Friday declared a legal holiday," but it was rejected for the stated reason that "there are already enough legal holidays[.]"[1] In the 1931 biennial

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[1] Haw. S. Stand. Comm. Rep. No. 225 (1929), *reprinted in* 1929 Haw. S.J. 727 (tabling S.B. 136); Excerpts of Record (ER) 46.

session, a virtually identical bill was introduced, but it, too, was rejected because "no good reason for adding to the number of Territorial holidays" was seen.[2] Similarly, in the 1937 biennial session, another bill for a Good Friday holiday was introduced and was once again rejected.[3]

In 1939, however, the legislative sentiment in both houses favored the establishment of a legal holiday on Good Friday. The religious basis for the decision was plainly set forth in the statement of legislative purpose:

> There are now ten legal holidays in the Territory, including Thanksgiving, plus primary and general election days. Public sentiment is divided on the advisability of creating Good Friday a legal holiday. Some feel that we already have too many holidays to the detriment of both private and public business. On the other hand, others feel equally strongly that good Friday[,] being in theory at least *a day of solemn religious observance* by the members of the various churches and religious denominations[,] should be given legal sanction. *More and more churches are now conducting the three-hour service on that day* and many business houses are allowing

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[2] Haw. S. Stand. Comm. Rep. No. 239 (1931), *reprinted in* 1931 Haw. S.J. 802-03 (tabling H.B. 297); ER 47.

[3] *See* 1937 Haw. H.J. 2359 (tabling Haw. H.B. 86, which would have added "[t]he Friday immediately preceding Easter Sunday and known as Good Friday" to the roster of holidays).

> their employees to take time off for this purpose. If the legislature should feel that we should have more legal holidays than we now have, it would seem that *in view of the religious significance of Good Friday* observance of this day would have as much justification as Thanksgiving or Christmas.
>
> The proponents of this Bill are *very sincere* in their reasons for desiring its passage . . . . [4]

(Emphasis added.) The 1939 Good Friday holiday bill passed unanimously in the House (29-0), by a wide margin in the Senate (11-4),[5] and was sent to the governor.

The governor received many objections to the bill,[6] including a letter from an officer of the Chamber of Commerce, pointing out that not all merchants would close on Good Friday and urging that "the present situation, whereby any employee who wishes to participate in Good Friday services is given time off, letting it be optional rather than legal, is the best solution."[7] The governor pocket-vetoed the bill.[8]

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[4] Haw. H. Stand. Comm. Rep. No. 254 (1939), *reprinted in* 1939 Haw. H.J. 890 (recommending passage of H.B. 39); ER 48-49.

[5] *See* 1939 Haw. H.J. 899 (vote of 29-0); 1939 Haw. S.J. 1086 (vote of 11-4).

[6] *See* Governor's Veto Message (May 3, 1939); ER 60.

[7] Letter from John A. Hamilton to Governor Joseph B. Poindexter (Apr. 24, 1939); ER 59.

[8] *See* 1939 Haw. S.J. 1596; *see also* ER 60. The governor's veto message was delivered after the legislature had adjourned.

In 1941, during the next biennial session, the legislature unanimously passed a bill designating Good Friday as a legal holiday.[9] It became law without the governor's signature,[10] and since that time Good Friday has been observed as a public holiday in Hawaii.[11]

Public expenditures in support of the Good Friday holiday now exceed $4,250,000 per year.[12] In the four years since the instant action was filed, the state and the county governments have spent well over $17,000,000 in

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[9] *See* 1941 Haw. H.J. 919-20 & 1362 (votes of 26-0 and 30-0 on Haw. H.B. 154); 1941 Haw. S.J. 765-66 (vote of 14-0 on the same bill).

The bill as introduced would have created a legal holiday on Lincoln's Birthday (February 12), but a floor amendment quickly restored the proposed Good Friday holiday that the governor had pocket-vetoed after the previous session. *See* 1941 Haw. H.J. 899, 919. Initially, a few senators thought that a holiday on Lincoln's Birthday was "inadvisable" during the same month as the existing holiday on Washington's Birthday (February 22). *See* 1941 Haw. S.J. 710; ER 52. Their concern was entirely allayed, however, and the bill with the two new holidays passed both houses unanimously.

[10] *See* 1941 Haw. H.J. 2509; 1941 Haw. S.J. 1433; Act 132, 1941 Haw. Sess. Laws.

[11] The holiday is now codified in Haw. Rev. Stat. § 8-1. *See* App. D.

[12] The State of Hawaii admits that it spends $3.4 Million per year on personnel costs to observe the holiday. *See* ER 62. The City and County of Honolulu admits that it spends approximately $350,000 per year for overtime holiday pay and another $500,000 per year for additional personnel costs to observe the holiday. *See* ER 61. The costs for the other counties are not on the record.

public funds to observe the holiday, the establishment of which was justified "in view of [its] religious significance." In addition, the public observance of Good Friday requires that state and all four county governments close down for the day, with public access to state and county facilities and services being denied or severely curtailed.

Proceedings Below

Petitioners Cammack, Lucas, Root, Stapleton, and Wallace[13] (Hawaii residents and taxpayers) filed suit under 42 U.S.C. § 1983 in federal district court against the governor, the mayor, other public officials, and public employee unions (respondents here). A12. Petitioners sought a declaration that the Hawaii statute that designates Good Friday as a legal holiday is unconstitutional as violative of the Establishment Clause of the First Amendment to the United States Constitution and that the public employee collective bargaining agreements are unconstitutional to the extent that they provide for paid leave on Good Friday. A12-A14. The district court's jurisdiction was invoked under 28 U.S.C. § 1343(a)(3).

Holding that the Good Friday holiday does not violate the Establishment Clause, the district court granted summary judgment for respondents. *See* App. B. By a divided vote, the court of appeals affirmed, stating that

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[13] Lucas, a Roman Catholic, is a lay teacher in a Catholic high school, where she is the chairperson of the theology department. Stapleton is a United Methodist minister and a lawyer. Wallace, also a lawyer, is a Unitarian. Cammack, a nonbeliever, is a transportation planner working for the State of Hawaii. Root is a chemist and has no religious affiliation.

the legislature's secular purpose for establishing the good Friday holiday was to have "another holiday," and stating that, as to the effect of the holiday, the "average" citizen of Hawaii would view Good Friday no differently from Christmas. A34, A38, A48. Judge Nelson, in her dissenting opinion below, found that the religious purpose was clear from the legislature's "perspicuous language [justifying the holiday] 'in view of the religious significance of Good Friday.' " A55 (quoting the 1939 legislature).[14] In addition, the effect of the Good Friday holiday is impermissible, Judge Nelson stated, because by endorsing a Christian holy day remembered for its "religious significance alone," A50, Hawaii conveys a message to nonChristians that their religious beliefs are not worthy of the same honor. A64.

Upon consideration of the petition for rehearing with suggestion of rehearing en banc, the court of appeals denied the petition over three dissenting opinions (written or joined by six circuit judges). *See* App. C. Judge Reinhardt, in his dissent, pointed out that the panel majority had misapplied the secular purpose test: "all essential elements of the statute [must be considered], not just those of secular origin." A114. Applied properly, the test leads to the "inexorable conclusion" that a primary purpose of the Good Friday holiday was "to foster the observance of religion," in violation of the Establishment Clause. *Id.* Judge Reinhardt found the effect of the holiday equally impermissible, because Good Friday, which "marks one of the holiest moments of a particular

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[14] *See* note 4, *supra*, and accompanying text.

faith," is an "occasion which Hawaii has chosen to consecrate and on which it has placed the official endorsement of the state." A119.

REASONS FOR GRANTING THE WRIT

A. Review should be granted to determine whether the Establishment Clause requires an examination of the specific purpose for the enactment as opposed to a broader, general purpose underlying the enactment.

This Court's Establishment Clause decisions make clear that any inquiry into an act's secular purpose begins by identifying the purpose "that *animated* the adoption of the Act." *Edwards v. Aguillard*, 482 U.S. 578, 585 (1987) (emphasis added); *id.* at 603 (identifying the act's "reason for existence") (Powell, J., concurring); *Bowen v. Kendrick*, 487 U.S. 589, 603-04 (1988) (identifying the specific aims of Congress); *Epperson v. Arkansas*, 393 U.S. 97, 108 (1968) (identifying "the law's reason for existence"). Justice O'Connor has explained the rationale for this requirement as follows:

> [T]he secular purpose requirement . . . serves an important function. It reminds government that when it acts it should do so *without endorsing a particular religious belief or practice that all citizens do not share.* In this sense, the secular purpose requirement is squarely based in the text of the Establishment Clause it helps to enforce.

Wallace v. Jaffree, 472 U.S. 38, 75-76 (1985) (O'Connor, J., concurring) (emphasis added).

When the purpose for an enactment is challenged as being religious, the proper inquiry relates *not* to a general purpose underlying the enactment, but to the specific purpose for the enactment itself. Thus, in *Epperson*, for example, the prohibition against teaching the theory of evolution in public schools was not rescued by the general purpose of "specify[ing] the curriculum in [Arkansas] public schools," 393 U.S. at 101 n.7, because the specific purpose was to tailor the curriculum to conform to "a particular religious doctrine [of] a particular religious group," *id.* at 104. Similarly, in *Kendrick*, the general goal identified by Congress for the Adolescent Family Life Act (to address the problems of adolescent sexuality, pregnancy, and parenthood) was not the focus of the secular purpose inquiry; instead, this Court examined the specific purpose (enlisting the aid of religious and charitable organizations, family members, voluntary associations, and other private sector groups in order to increase broad-based community involvement in solving the identified problem) and found that the purpose of the enactment was essentially secular. 487 U.S. at 603. In *Abington School District v. Schempp*, 374 U.S. 203, 223 (1963), the public school practice of reading Bible verses and reciting a prayer in unison each morning could not be validated by reference to general public goals such as "promotion of moral values," when the practice in question was plainly a religious exercise.

The recitation of broad, general purposes, as in the cases cited above, or the recitation of purportedly secular

purposes[15] or ancillary secular objectives[16] is immaterial to the secular purpose analysis, which examines the specific purpose that animated the act in question. As Judge Reinhardt pointed out in his dissent from the order denying en banc review in this case, "*every* statute [could] be described in such a way that it includes a secular purpose." A113 (emphasis in original). Given these principles, this Court has not been deterred from striking down laws enacted for a "preeminent religious purpose." *Edwards*, 482 U.S. at 590.

In the instant case, the Hawaii legislature was perfectly candid about its religious purpose for enacting the Good Friday holiday. The legislative history shows that, from 1929 to 1937, the prevailing view in the legislature was that Hawaii already had a sufficient number of holidays and that no good reason had been offered for adding Good Friday to the list. In 1939, the proponents of

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[15] *See Edwards*, 482 U.S. at 586 (rejecting legislature's stated purpose to "protect academic freedom" when purpose of creationism act was to forbid the teaching of the theory of evolution in public schools except in conjunction with teaching a religious doctrine); *Stone v. Graham*, 449 U.S. 39, 41 (1981) (rejecting "legislative recitation of a supposed secular purpose" for posting the text of the Ten Commandments in public school classrooms).

[16] *See Lynch v. Donnelly*, 465 U.S. 668, 691 (1984) (noting that a statute enacted with a preeminent religious purpose is not saved by the mere existence of "some secular objectives") (O'Connor, J., concurring).

the bill acknowledged that there was some public sentiment opposing any more holidays but stated that, as a day of "solemn religious observance by the members of the various churches and religious denominations," Good Friday "should be given legal sanction."[17] Public observance of the holiday was said to be justified "in view of the religious significance of Good Friday," and the proponents declared themselves "very sincere" in their reasons for pressing for the Good Friday holiday bill.[18] With these words, the proponents of the bill won near unanimous support for the legislation in 1939 and achieved its enactment in 1941. As Judge Nelson said in her dissenting opinion below, the religious purpose that animated the establishment of the Good Friday holiday could not be more perspicuous. A55.

The majority below decided that having "another holiday" was the relevant purpose and that that purpose was "primary" or at least constituted "*a* legitimate, sincere secular purpose." A38, A34 (emphasis in original).[19] Then, having cited *Bowen v. Kendrick*, 487 U.S. 589 (1988), for the proposition that the purpose of a statute is impermissible only if the purpose is "wholly" or "entirely" religious, A29, the majority below concluded that the secular purpose requirement was satisfied.

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[17] *See supra* note 4 and accompanying text.

[18] *Id.*

[19] The analogy to *Epperson* is striking: there the Arkansas Supreme Court had decided that the law banning the teaching of evolution from the public school curriculum served the secular purpose of setting the curriculum, *see* 393 U.S. at 101 n.7, but this Court rejected that characterization.

This Court's secular purpose analysis in *Kendrick* identified and analyzed the animating purpose of the enactment in question, not broad, general purposes or ancillary objectives. The court of appeals below, however, not only failed to follow the analytical approach in *Kendrick* but disregarded this Court's earlier precedents such as *Edwards, Wallace, Stone, Epperson,* and *Schempp.* For this reason, petitioners submit that the fundamental misunderstanding of the Establishment Clause evident in the decision below demonstrates the need for plenary review by this Court.

B. Review should be granted to resolve whether the judiciary is free to "revise" legislative intent.

Despite finding no "religious motivation" for the Good Friday holiday enactment, A32, the majority below did acknowledge that "an improper purpose" might be "gleaned" from the legislative history. A34. To remedy that problem, the court of appeals substituted its own versions of legislative intent for the legislature's actual intent, as follows: the court said that the purpose of the 1941 enactment is to be found in the present-day "concerns of organized labor," A34-A35 (citing *McGowan v. Maryland,* 366 U.S. 420 (1961); that the purpose was "the majority's political accommodation of its own religious practices,"[20] A35 &

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[20] In fact, employees were already being accommodated by being given time off if they "wish[ed] to participate in Good Friday services" (*see supra* note 7 and accompanying text). Accommodation was plainly not the legislature's purpose.

n.15; and that the purpose was to establish "a uniform day of rest," A34, A44 (alluding to *McGowan*).

In *McGowan*, this Court upheld Maryland's Sunday closing laws, after noting the "special significance [of Sunday] as a rest day," a day of "family activity," and a day of secular import for "*[p]eople of all religions and people with no religion*[.]" 366 U.S. at 451-52 (emphasis added). In contrast, Good Friday has acquired no secular traditions and remains an exclusively religious day.[21] It is a day of holy obligation for practicing Christians, but for "adherents of other religions or nonreligious persons" it is a day they "could not imagine honoring." A70 (Nelson, J., dissenting).

Moreover, in *McGowan*, it was the legislature, not the Court, that stated its purpose to ensure a "common day of rest" for all members of the family and community. Here, however, the court of appeals borrowed the Maryland legislature's secular purpose for the 1956 Sunday

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[21] The district court below said that Good Friday has "attained a partially secular character[.]" A103. Its explanation was that for Christians, Good Friday is a holy day, but for "Jews, Buddhists, Baha'is, and atheists," it is a day for "hunting for gaily colored eggs [and] delivering baskets of candies and flowers to family and friends [.]" A98. Disavowing that notion, the court of appeals stated that it did not accept the contention that Good Friday has become secularized. A49 n.19. Other than the district court below, no court has found any secularization of Good Friday. *See Mandel v. Hodges*, 54 Cal. App. 3d 596, 612, 127 Cal. Rptr. 244, 254 (1976) (no evidence of secularization "in any degree"); *Griswold Inn, Inc. v. State*, 183 Conn. 552, 441 A.2d 16, 21 (1981) (clearly lacks "acceptance as a secular holiday").

closing laws and substituted it for the Hawaii legislature's express, preeminent religious purpose for the 1941 Good Friday holiday law. Petitioners would ask this Court to decide whether the courts are free to discard legislative intent and substitute their own statement for the legislature's statement of purpose.[22]

C. Review should be granted to resolve whether preferential treatment of the religious beliefs and practices of the dominant faith is now deemed permissible.

"In selecting particular state holidays, the polity does more than honor the past; it identifies the people, events, and values from which it draws inspiration and seeks guidance." A65 (Nelson, J., dissenting). The legislature's selection of holidays is viewed by the public as a collective expression of the community's wish to accord special approval of particular events and persons. As Judge Nelson pointed out, the "fierce debates over the celebration of Martin Luther King Day attest to our own extreme sensitivity to this issue." *Id.* "By honoring a given day, the state *endorses* an event as a fair reflection of its beliefs; it *establishes* that event as a privileged repository of its values." *Id.* (emphasis in original). The symbolic significance of such action is not only intentional, but inescapable.

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[22] This is not to say that courts should accept a "sham secular purpose" or a purpose statement that is not "sincere." *See Wallace*, 472 U.S. at 75 (O'Connor, J., concurring); *Edwards*, 487 U.S. at 604. Here, nothing would suggest that the expressed intent of the Hawaii legislature was insincere or was a sham.

It is widely recognized that, unlike Good Friday, the observance of Christmas encompasses secular and religious celebration and that many people of many religions (or no religion) join in its secular celebration. For that reason, "government's own celebration of Christmas" is permissible as to "the holiday's secular aspects," but government may not affiliate itself with the religious message of Christmas as a holy day. *County of Allegheny v. ACLU*, 492 U.S. 573, 611 (1989). Government's "respect for religious pluralism, a respect commanded by the Constitution," *id.* at 610, is thus compatible with the public observance of Christmas as a holiday. By observing Good Friday as a public holiday, however, the State of Hawaii commemorates the holiest day of the Western Christian calendar,[23] a day with no secular message, a day that represents a central message of the Christian faith. The state's commemoration is not, and cannot be, shared by those who, *because of their religion*, do not believe in the central tenet of the Christian faith and, therefore, cannot accord special honor to Good Friday.

The court of appeals stated that Hawaii's holidays "are all selected for their importance to the citizens of Hawaii" but nonetheless held that the holiday observance of Good Friday is "a mere 'acknowledgment' of religion," not an endorsement. A44. In fact, however, the Hawaii

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[23] The Eastern Christian churches use a different ecclesiastical calendar for determining the dates of Easter and Good Friday, which in most years do not coincide with the dates as calculated by the Western Christian churches. *Griswold Inn*, 441 A.2d at 18.

legislature has distinguished days that are merely worthy of "acknowledgment" from those that are truly worthy of holiday recognition and concomitant public observance at considerable public expense. In 1963, when the legislature had considered a bill introduced "to honor the birthday of Gautama Buddha by establishing April 8 as a State holiday,"[24] the legislature soon amended the bill to delete the proposed holiday status,[25] and then recommended Buddha Day as worthy of public acknowledgment in recognition of its "tremendous" importance[26] to the "thousands of people in the State of Hawaii" who celebrate Buddha Day each year.[27] Now the acknowledgment of Buddha Day lies in a dusty statute where it remains little noticed.[28] In contrast, the public is reminded each year of the preferential place given to Good Friday, which commemorates the crucifixion of Jesus Christ, the religious event that is central to the Christian faith itself.

Endorsement is "a message to nonadherents that they are outsiders, not full members of the political community, and an accompanying message to adherents that

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[24] Haw. H. Stand. Comm. Rep. No. 279 (1963), *reprinted in* 1963 Haw. H.J. 661 (recommending passage of H.B. 1038).

[25] Haw. S. Stand. Comm. Rep. No. 935 (1963), *reprinted in* 1963 Haw. H.J. 843 (recommending passage of H.B. 1038 as amended).

[26] *Id.*

[27] Act 162, 1963 Haw. Sess. Laws (codified as Haw. Rev. Stat. § 8-4. *See ER 44, 56.*

[28] *See* Haw. Rev. Stat. § 8-4. Similarly, one of the holy days of the Baha'i faith is noted in Haw. Rev. Stat. § 8-4.5.

they are insiders, favored members of the political community." *Lynch v. Donnelly*, 465 U.S. at 689 (O'Connor, J., concurring). Here, an objective observer "acquainted with the text, legislative history, and implementation of the statute," *Wallace*, 472 U.S. at 76 (O'Connor, J., concurring), would receive a message of endorsement because of the legislative history of the holiday and the millions of taxpayer dollars expended each year to implement the holiday, coupled with the annual cessation of public business, in order for the state to accord a special place of honor to a Christian holy day of atonement, a day without any form of secular celebration that other members of the community might share.

This Court recognizes "the bedrock Establishment Clause principle that, regardless of [the earlier] history [of our nation], government may not demonstrate a preference for a particular faith. . . . " *County of Allegheny*, 492 U.S. at 605. " 'The clearest command of the Establishment Clause is that one religious denomination cannot be officially preferred over another.' " *Id.* (quoting *Larson v. Valente*, 456 U.S. 228 (1982); *see also Estate of Thornton v. Caldor, Inc.*, 472 U.S. 703, 709-10 & n.9 (1985) (preferential treatment for sabbath observers held impermissible). One of the questions put to this Court is whether the court of appeals was correct in holding that the state's clear demonstration of its preference for the beliefs and practices of the Christian faith is now deemed permissible.

CONCLUSION

For the foregoing reasons, the petition for writ of certiorari should be granted.

Respectfully submitted,

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Dated: November 12, 1991

APPENDIX A

FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

NELL A. CAMMACK; GENIE LUCAS; DOUGLAS PAUL ROOT; CAROLYN L. STAPLETON; MICHELE WALLACE,

Plaintiffs-Appellants,

v.

JOHN W [SIC]. WAIHEE, in his capacity as Governor of the State of Hawaii; ALFRED LARDIZABAL, in his capacity as Director of Personnel Services of the State of Hawaii; FRANK F. FASI, in his capacity as Mayor of the City & County of Honolulu; JEREMY HARRIS, in his capacity as Managing Director of the City & County of Honolulu; LORETTA K. FUKUDA, in her capacity as the Director of Civil Service of the City & County of Honolulu; UNITED PUBLIC WORKERS, LOCAL 646, AFSCME; [HAWAII GOVERNMENT EMPLOYEES' ASSOCIATION, LOCAL 152, AFSCME;] HAWAII STATE TEACHERS ASSOCIATION; UNIVERSITY OF HAWAII PROFESSIONAL ASSEMBY [SIC]; HAWAII FIRE FIGHTERS ASSOCIATION, LOCAL 1463, IAFF; STATE OF HAWAII ORGANIZATION OF POLICE OFFICERS,

Defendants-Appellees.

No. 87-15073

D.C. No. CV-87-0260-ACK

ORDER AND AMENDED OPINION

Appeal from the United States District Court
for the District of Hawaii
Alan C. Kay, District Judge, Presiding

Argued and Submitted
November 14, 1988 – Honolulu,

Filed April 30, 1991
Amended August 9, 1991

Before: Dorothy W. Nelson, Diarmuid F. O'Scannlain and Stephen S. Trott, Circuit Judges.

Opinion by Judge O'Scannlain;
Dissent by Judge D. W. Nelson

SUMMARY

Constitutional Law

Affirming a district court grant of summary judgment, the court of appeals held that a Hawaii statute declaring Good Friday a state holiday was constitutional.

Since 1941, the State of Hawaii has, by legislative declaration, observed Good Friday as a state holiday. By providing a state holiday, the statute in question has the fiscal impact that many state and local government offices are closed, and many state and local government employees do not report to work. Hawaii's public collective bargaining law mandates that the terms and conditions of public employment be determined through a collective bargaining process. The number and dates of paid leave days are among the mandatory subjects of collective bargaining. Good Friday is included as one such paid leave day. Appellants Nell A. Cammack and others, taxpayers and residents of the state, challenged

the statute in question alleging that setting apart Good Friday as a state holiday violated both the establishment clause of the first amendment of the federal constitution and the state constitution. Appellants also sought a declaration that the state and city collective bargaining agreements were unconstitutional because they provided for paid leave on Good Friday. The district court granted summary judgment in favor of the government.

[1] Initially, the court considered whether appellants, as state and municipal taxpayers, had properly alleged an injury sufficient to endow them with taxpayer standing to challenge the Good Friday public holiday. This required an examination of the injury requirements that pertain to each relevant form of taxpayer standing – state and municipal. [2] The direct injury required by *Doremus* is established when the taxpayer brings a "good-faith pocketbook action;" that is, when the challenged statute involves the expenditure of state tax revenues. [3] While the Ninth Circuit has not previously ruled on the different injury requirements, if any, for municipal taxpayer standing, the court concluded that municipal taxpayer standing simply required the "injury" of an allegedly improper expenditure of municipal funds, and in this way mirrored the court's threshold for state taxpayer standing. [4] Here, appellants' had standing because they set forth their status as state and municipal taxpayers and specifically stated the amount of funds appropriated and allegedly spent by the taxing governmental entities as a result of the Good Friday holiday. [5] The court rejected the government's argument that taxpayers as such cannot have standing to challenge the statute in question because the bare declaration of Good Friday as a state

holiday does not, standing alone, involve any expenditure of tax revenues. Legislative enactments are not the only government activity that the taxpayer may have standing to challenge. The taxpayers' allegations identified an expenditure of public funds sufficiently related to appellants' constitutional claim. They also established causation and redressability.

[6] The court noted that the Supreme Court has recently stated that the Establishment Clause means that government may not promote or affiliate itself with any religious doctrine or organization. However, that clause permits government some latitude in recognizing and accommodating the central role religion plays in this society. [7] As such, the court rejected the government's contention that *Marsh* controlled the disposition of this case. Although Hawaii's recognition of Good Friday stems back to its days as a territory, nonetheless it could not be said that it was deeply embedded in the fabric of the state as was legislative prayer in *Marsh*.

[8] The challenged statute had to satisfy all three prongs of the *Lemon* test to comport with the establishment clause. [9] The purpose prong is clearly violated when there is no legitimate secular purpose for the legislation. [10] A statute will fail this prong only if it is motivated wholly by an impermissible purpose. [11] However, in reviewing a challenged statute for a secular purpose, the court is reluctant to attribute unconstitutional motives to the states, particularly when a plausible secular purpose for the state's program may be discerned from the face of the statute. [12] An examination of the legislative history surrounding Hawaii's Good Friday law

demonstrated that the primary concern motivating selection of the holiday was simply timing and that the legislature's consideration of earlier attempts to have Good Friday declared a public holiday were devoid of sectarian influences. [13] The court agreed with the district court's conclusion that the primary purpose of the law was to have more legal holidays.

[14] The most ardent proponents of the statute in this litigation were the labor unions who had incorporated the statutory holidays into their collective bargaining agreements with the state and local governments. This was a strong indicant that the purpose animating the challenged act was not so much state sponsorship of religion as state sensitivity to the concerns of organized labor.

[15] The court did not think it was constitutionally significant that Hawaii selected a day of traditional Christian worship, rather a neutral date, for its spring holiday once it identified the need. [16] The court concluded there was nothing impermissible about considering for holiday status days on which many people choose to be absent from work for religious reasons. That the state legislature was able to accomplish its secular purpose and at the same time accommodate the widespread religious practices of its citizenry was hardly a reason to invalidate the statute under the purpose prong of the *Lemon* test.

[17] The court next considered whether the Good Friday holiday violated the second prong of the *Lemon* test. This required examining whether the primary effect of the statute was the advancement of religion. [18] Given

that the evidence in this case indicated that large numbers of Hawaiians observe Good Friday, the legislature could not be faulted for not selecting a different spring day for a common day of rest. That the special status of Good Friday derives from its religious origin was no more relevant than Sunday's status as the sabbath for the dominant Christian sects. [19] Evidence that Hawaiians used this day for shopping and pleasure outings indicated that Hawaii's Good Friday holiday, at least at this late day, fifty years after enactment, could not be regarded as an endorsement of religion any more than Sunday closing laws could. [20] The breadth of impact of Hawaii's statute, on its face and by its incorporation into the collective bargaining agreements, contributed to the conclusion that the statute's effect was simply the creation of a paid leave day for all state employees covered by the collective bargaining agreements, regardless of individual beliefs. The paid leave was for the entire day and not only for the three hours associated with the traditional Christian observance of Good Friday.

[21] Good Friday's mere placement on the roll of public holidays, along with other important days of secular and religious significance, diminished the likelihood of an "endorsing" effect. The government's action might best be termed a mere "acknowledgment" of religion. Closing state offices on that day simply acknowledged Good Friday's status as a holiday observed widely enough that the secular purpose of establishing a uniform day of rest was appropriately achieved by selecting it. [22] The context of the Good Friday holiday, a minimal accommodation of the religious practices of some Hawaiians, decreased the likelihood of a public perception of

endorsement. Consequently, the statute satisfied the effect prong of the *Lemon* test.

[23] The third prong of the *Lemon* test required examination of whether the Hawaii statute led to an excessive entanglement with religion. [24] In the case of Hawaii's Good Friday holiday, to the extent that the actual date of the holiday would be determined by resort to church calendars, any such entanglement would surely not be the kind of comprehensive and enduring entanglement the first amendment prohibits. [25] In addition, although political divisiveness has been considered in establishment clause cases, it has never been relied on as an independent ground for holding a government practice unconstitutional. Thus, the Hawaii statute satisfied the entanglement prong of the *Lemon* test.

[26] The Hawaii law did not require or endorse any religious activity, and the only public expenditure associated with the holiday was the continued pay accrued by public employees. The court was persuaded that nothing more was "established" by the statute than an extra day of rest for a weary public labor-force.

Dissenting, Judge Nelson stated that the holly and the ivy, jingling bells, red-nosed reindeer, and frosty snowmen this case was not. What this case was about was Hawaii's endorsement, by means of a state holiday, of a day thoroughly infused with religious significance alone. Because Judge Nelson believed that such a state establishment of religion violated both the purpose and effects prongs of *Lemon*, she strongly dissented.

COUNSEL

Kirk Cashmere and Karen A. Essene, American Civil Liberties Union, Honolulu, Hawaii, for plaintiffs-appellants.

Steven S. Michaels, Deputy Attorney General, Honolulu, Hawaii, for defendant-appellee, State of Hawaii.

Danny J. Vasconcellos, Honolulu, Hawaii, for defendant-appellee United Public Workers, Local 646, AFSCME and Hawaii Government Employees' Association, Local 152, AFSCME.

Vernon Yu and T. Anthony Gill, Gill, Park, Park & Kim, Honolulu, Hawaii, for defendant-appellee Hawaii State Teachers Association and University of Hawaii Professional Assembly.

ORDER

The opinion filed April 30, 1991, slip op. 5347, is amended as follows:

1. On page 5354 of the slip opinion, replace the word "eleven" on line 2 with "twelve" and insert "North Carolina," after "Mexico," on line 4.

2. On page 5354 of the slip opinion, insert "N.C. Gen. Stat. § 103-4(a)(8) (Supp. 1990);" before "N.D. Cent. Code" on line 8 of footnote 2 (the last line of the page).

3. On page 5355 of the slip opinion, delete "*See also* N.C. Gen. Stat. § 103-4(a)(8) (recognizing Easter Monday

as a North Carolina state holiday)." from lines 9-11 of footnote 2 (lines 1-3 on page 5355).

4. On page 5371 of the slip opinion, delete the word "originally" from lines 9-10 of the text on the page.

5. On page 5371 of the slip opinion, delete "why the legislature ultimately opted only for Good Friday" from lines 12-13 of the text on the page, and replace with the following: "that the committee was most interested in the timing of the proposed new holidays".

6. On page 5371 of the slip opinion, after "1941 Haw. Sen. J. 710," on line 22 of the text on the page, insert the following sentences: "Nothing in the legislative history concerning the 1941 bill suggests a religious motivation for its ultimate passage. Indeed, the legislature's approval of both proposed holidays and the governor's expressed opposition, because "the holidays were getting a bit thick about that time of year," betray no particular interest in the secular or sectarian origins of either day."

The pending petition for rehearing and suggestion for rehearing en banc will be addressed in a separate order.

OPINION

O'SCANNLAIN, Circuit Judge:

We are asked to decide the constitutionality of a Hawaii statute declaring Good Friday a state holiday. Our task is not as simple as it might appear.

I

In 1941, the Territory of Hawaii enacted a bill declaring that Good Friday, the Friday preceding Easter Sunday, shall be "set apart and established as [a] territorial holiday[ ]." Act effective Apr. 30, 1941, No. A-1 [sic], § 1, 1941 Haw. Sess. Laws 1. Upon statehood, the legislation was ratified and now appears as part of Hawaii Revised Statutes section 8-1, which designates Hawaii state holidays.[1]

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[1] Section 8-1 in its entirety provides as follows:

§ 8-1 Holidays designated. The following days of each year are set apart and established as state holidays:

The first day in January, New Year's Day;

The third Monday in January, Dr. Martin Luther King, Jr., Day;

The third Monday in February, Presidents' Day;

The twenty-sixth day in March, Prince Jonah Kuhio Kalanianaole Day;

The Friday preceding Easter Sunday, Good Friday;

The last Monday in May, Memorial Day;

The eleventh day in June, King Kamehameha I Day;

The fourth day in July, Independence Day;

The third Friday in August, Admission Day;

The first Monday in September, Labor Day;

The eleventh day in November, Veterans' Day;

(Continued on following page)

Good Friday has thus been a public holiday in Hawaii for fifty years. Good Friday is also a public holiday in twelve other states: Delaware, Florida, Georgia, Indiana, Louisiana, Maryland, New Jersey, New Mexico, North Carolina, North Dakota, Tennessee, and Wisconsin.[2]

Hawaii's section 8-1 appropriates no funds to carry out its purposes. By providing for state holidays, however, the statute has at least the fiscal impact that many

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> The fourth Thursday in November, Thanksgiving Day;
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> The twenty-fifth day in December, Christmas Day;
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> All election days, except primary and special election days, in the county wherein the election is held;
>
> Any day designated by proclamation by the President of the United States or by the governor as a holiday.

Haw. Rev. Stat. § 8-1 (Supp. 1989).

[2] *See Public Serv. Co. v. Catron*, 98 N.M. 134, 135, 646 P.2d 561, 562 (1982) (construing N.M. R. App. P. 23(a) (Civ.)); Del. Code Ann. tit. 1, § 501 (Supp. 1988); Fla. Stat. Ann. § 683.01(1)(h) (West 1990); Ga. Code Ann. § 1-4-1(a) (authorizing Governor to declare April 26 a state holiday or substitute in another traditional day of worship); Ind. Code § 1-1-9-1(a) (Supp. 1990); La. Rev. Stat. Ann. § 1:55 E.1(a) (West Supp. 1990); Md. Ann. Code art. 1, § 27(a)(6) (Supp. 1990); N.J. Stat. Ann. § 36:1-1 (West Supp. 1990); N.C. Gen. Stat. § 103-4(a)(8) (Supp. 1990); N.D. Cent. Code § 1-03-01(4) (1975); Tenn. Code Ann. § 15-1-101 (1987); Wis. Stat. Ann. § 895.20 (West Supp. 1989). The New York Stock Exchange also adjourns for Good Friday. *See* 50 Fed. Reg. 41,283 n.3 (1985) (noting proposal to open on Good Friday).

state and local government offices are closed and many state and local government employees need not report to work. Furthermore, in 1970, the Hawaii Legislature enacted a public collective bargaining law which mandated that the terms and conditions of public employment be determined through a collective bargaining process. The statute recognized that "joint decision-making [between public employees and their employers] is the modern way of administering government." *Id.* § 89-1. The number and dates of paid leave days are among the mandatory subjects of collective bargaining. All collective bargaining agreements currently in effect between public employees and their employers provide for numerous paid leave days, either expressly or through incorporation of section 8-1. Good Friday is included as one such paid leave day. These collective bargaining agreements cover approximately sixty-five percent of Hawaii's public employees.

II

Nell A. Cammack, Genie Lucas, Douglas Paul Root, Carolyn L. Stapleton, and Michele Wallace, Hawaii taxpayers and residents, filed suit under 42 U.S.C. § 1983 in federal district court against the Governor of the State of Hawaii, the Mayor of the City and County of Honolulu, other officials, and public employee organizations (collectively called "government"), seeking declaratory relief and attorney fees.[3] They allege that the Hawaii statute

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[3] Because the parties have not briefed the point, we express no opinion on the efficacy of bringing an establishment

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setting apart Good Friday as a state holiday violates both the establishment clause of the first amendment of the United States Constitution and article 1, section 4 of the Hawaii State Constitution.[4] Appellants also seek a

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clause challenge under section 1983. We note that this route has been traveled before without exciting controversy (or even comment). *See, e.g., Marsh v. Chambers*, 463 U.S. 783, 785 (1983) (simply noting that establishment clause challenge was brought under section 1983); *ACLU v. County of Allegheny*, 842 F.2d 655, 656-57 (3d Cir. 1988) (same), *aff'd in part and rev'd in part*, 492 U.S. 573 (1989). Presumably, a successful challenge here would result in an award of attorney fees. *See* 42 U.S.C. § 1988 (1988).

[4] It appears that the protections afforded by both are co-extensive. *See Koolau Baptist Church v. Department of Labor*, 68 Haw. 410, 718 P.2d 267 (1986) (applying first amendment establishment clause *Lemon* test to claim brought under state and federal constitutions); Op. Haw. Att'y Gen. No. 85-25 (Nov. 15, 1985) (analyzing validity of state license of church-sponsored day care programs under the *Lemon* test). *Compare* U.S. Const. amend. I ("Congress shall make no law respecting an establishment of religion") *with* Haw. Const. art. I, § 4 ("No law shall be enacted respecting an establishment of religion"). In general, Hawaiian courts resolving cases involving religious freedoms look to first amendment principles and authorities. *See, e.g., Dedman v. Board of Land & Natural Resources*, 69 Haw. 255, 740 P.2d 28 (1987), *cert. denied*, 485 U.S. 1020 (1988); *State v. Andrews*, 65 Haw. 289, 651 P.2d 473 (1982); *Medeiros v. Kiyosaki*, 52 Haw. 436, 478 P.2d 314 (1970); *State v. Blake*, 5 Haw. App. 411, 695 P.2d 336 (1985). The state's high court also relies upon first amendment jurisprudence to resolve free speech claims brought under the state constitution. *See, e.g., State v. Hawkins*, 64 Haw. 499, 643 P.2d 1058 (commercial speech), *cert. denied*, 459 U.S. 824 (1982); *State v. Bloss*, 64 Haw. 148, 637 P.2d 1117 (1981) (same), *cert. denied*, 459 U.S. 824 (1982); *State v.*

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declaration that the state and city collective bargaining agreements are unconstitutional to the extent that they provide for paid leave on Good Friday.

The district court granted summary judgment in favor of the government, determining that the appellants had standing to bring the action but upholding section 8-1 and the collective bargaining agreements as constitutional. *See Cammack v. Waihee*, 673 F. Supp. 1524 (D. Haw. 1987). This appeal followed.

III

The government contends that this court lacks jurisdiction because appellants' notice of appeal is defective and because appellants do not have standing. We examine each argument in turn.[5]

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Bumanglag, 63 Haw. 596, 634 P.2d 80 (1981) (pornography); *State v. Manzo*, 58 Haw. 440, 573 P.2d 945 (1977) (same); *Cahill v. Hawaiian Paradise Park Corp.*, 56 Haw. 522, 543 P.2d 1356 (1975) (defamation).

[5] The government also argues that the district court improperly declined to abstain from deciding this case. Abstention in some instances may be appropriate. *See Burdick v. Takushi*, 846 F.2d 587, 588 (9th Cir. 1988) (abstention is warranted when proper resolution of the state law question at issue is uncertain; a definitive ruling on the state issue potentially obviates the need for constitutional adjudication by the federal courts; the complaint touches upon a sensitive area of social policy). However, abstention from exercising federal

(Continued on following page)

A

Appellants' notice of appeal reads, in pertinent part: "Notice is hereby given that Plaintiffs above-named hereby appeal . . . the final judgment . . . " Notice of Appeal, *Cammack v. Waihee*, Civil No. 87-0260 (D. Haw. Dec. 4, 1987). The compound adjective "above-named" apparently refers to the notice's caption, which states: "Nell A. Cammack, et al., Plaintiffs, vs. John Waihee, et al., Defendants." *Id.*

Federal Rule of Appellate Procedure 3(c) provides that a notice of appeal "shall specify the party or parties taking the appeal." In *Torres v. Oakland Scavenger Co.*, 487 U.S. 312 (1988), the Supreme Court held that courts "may not waive the jurisdictional requirements of Rules 3 and 4, even for 'good cause shown.' " *Id.* at 317. In that case, Torres, one of sixteen plaintiffs, had inadvertently been omitted from the list of appellants in the notice of appeal. *Id.* at 313; *see id.* at 323 (Brennan, J., dissenting) (noting that the other fifteen plaintiffs were listed by name as appellants). The Court concluded that Torres had not satisfied the jurisdictional requirements for maintaining

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jurisdiction is the exception. *See Colorado River Water Conservation Dist. v. United States*, 424 U.S. 800, 813 (1976) ("The doctrine of abstention, under which a District Court may decline to exercise or postpone the exercise of its jurisdiction, is an extraordinary and narrow exception to the duty of a District Court to adjudicate a controversy properly before it.") (quotation omitted). Here, there appears to be no likelihood of a different result under the state constitution's establishment clause. *See supra* note 4; *see also Cammack*, 673 F. Supp. at 1528-29 (finding no likelihood of a different result).

an appeal, because "he was never named or otherwise designated, however inartfully, in the notice of appeal." *Id.* at 317. The use of the term "et al." in the notice of appeal was insufficient to indicate Torres' intent to appeal, because such a vague designation would not put the appellee or court on notice that Torres was indeed an appellant. *See id.* at 317-18.

In a recent case tracking more closely the facts of the controversy before us, this court ruled that a bare reference to "defendants" in the body of the notice, coupled with use of "et al." in the caption, constituted sufficient notice that all defendants sought appeal of the district court's judgment.[6] *See National Center for Immigrants' Rights, Inc. v. INS*, 892 F.2d 814 (9th Cir. 1989) (per curiam). Where no names were listed in the body of the notice, we held, the intention to include all of the group of "defendatns" in the appeal was clear. *See id.* at 816-17. If only some of the defendants had intended to appeal, the body of the notice would likely have indicated that "certain defendants" were appealing, or would have listed the specific appellants. *Id.* at 817; *see also Ford v. Nicks*, 866 F.2d 865, 869-70 (6th Cir. 1989) (use of "et al." in caption and indication that "the defendants" were appealing in the body of the notice sufficient to give notice that all defendants were appealing), *overruled, Minority Employees v. Tennessee Dep't of Employment Security*, 901 F.2d 1327 (6th Cir. 1990) (en banc).

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[6] There is no distinction between "defendants" or "plaintiffs" for the purposes of becoming "appellants" before this court.

As in *National Center for Immigrants' Rights, Inc.*, the notice of appeal in this case is sufficiently clear to alert the court and defendants that all plaintiffs are seeking to appeal. There is no Rule 3(c) jurisdictional bar to this appeal, and we decline the government's invitation to dismiss the appeal.[7]

B

A more difficult question is whether the appellants have standing to maintain this action in federal court. The original complaint alleges each plaintiff to be a citizen of the State of Hawaii, a resident of the City and County of Honolulu, and a taxpayer to each of these entities. Complaint 2-3, *Cammack v. Waihee*, Civil No. 87-0260 (D. Haw. April 6, 1987). The complaint's allegations include the assertion that $3.4 million in state tax revenues and $850,000 in city tax revenues are expended on the holiday. *See id.* at 7.

The district court held that the plaintiffs had state taxpayer standing to challenge the Hawaii statute in federal court. *See Cammack*, 673 F. Supp. at 1527-28. The government argues that the district court erred. The district court did not reach the question of municipal taxpayer standing, but the issue is squarely presented on this record. We consider whether the plaintiffs below (and appellants here) have either state or municipal taxpayer standing to pursue this action in federal court.

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[7] Even if we were to read the notice of appeal more narrowly, the designation of "Nell A. Cammack" in the caption would be sufficient to preserve her appeal. *See National Center for Immigrants' Rights, Inc.*, 892 F.2d at 816 n.2.

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[1] THe bedrock requirement for standing is that the challenger suffer "injury." We first consider whether appellants, as state and municipal taxpayers, have properly alleged an injury sufficient to endow them with taxpayer standing to challenge the Good Friday public holiday. This requires an examination of the injury requirements which pertain to each relevant form of taxpayer standing – state and municipal.

[2] The seminal state taxpayer standing case is *Doremus v. Board of Education*, 342 U.S. 429 (1952). In that case, the Supreme Court explained that a state taxpayer has standing to challenge a state statute when the taxpayer is able to show that he " 'has sustained or is immediately in danger of sustaining some direct injury as the result of [the challenged statute's] enforcement.' " *Id.* at 434 (quoting *Massachusetts v. Mellon*, 262 U.S. 447, 488 (1923) (also known as *Frothingham v. Mellon*)). *The direct injury required by Doremus* is established when the taxpayer brings a "good faith pocketbook action", that is, when the challenged statute involves the expenditure of state tax revenues. *Hoohuli v. Ariyoshi*, 741 F.2d 1169, 1178 (9th Cir. 1984) (pleadings must "set forth the relationship between taxpayer, tax dollars, and the allegedly illegal government activity") (citing *Doremus*); *see also Reimers v. State of Oregon*, 863 F.2d 630, 632 n.4 (9th Cir. 1988) (no state taxpayer standing where taxpayer does not challenge the disbursement of state funds) (citing *Doremus*). However, *Hoohuli*, the leading case on this issue in the circuit, does not require that the taxpayer prove that her

tax burden will be lightened by elimination of the questioned expenditure. *See Minnesota Fed'n of Teachers v. Randall*, 891 F.2d 1354, 1357 (8th Cir. 1989) (following *Hoohuli*); *cf. District of Columbia Common Cause v. District of Columbia*, 858 F.2d 1, 5 (D.C. Cir. 1988) (injury redressed by elimination of expenditure, rather than by decrease in taxation).

[3] This court has not previously ruled on the different injury requirements, if any, for municipal taxpayer standing.[8] It seems to us, however, that the *Doremus* requirement of a pocketbook injury applies to municipal taxpayer standing as well as to state taxpayer standing. *Doremus* itself, while treating the specific question of state taxpayer standing, quoted a municipal taxpayer standing case for the proposition that a direct injury was necessary. *See Doremus*, 342 U.S. at 434 (quoting *Massachusetts (Frothingham)*, 262 U.S. at 448). The Court in *Doremus* then harmonized its announced rule with a school district taxpayer case. *See id.* (discussing *Everson v. Board of Educ.*, 330 U.S. 1 (1947) (assuming standing for school district taxpayer challenge of school board expenditures for transportation of parochial school students)). Subsequent cases have made clear that municipal taxpayer standing

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[8] In *Grove v. Mead School District No. 354*, 753 F.2d 1528 (9th Cir.), *cert. denied*, 474 U.S. 826 (1985), an establishment clause case, we observed that the United States Supreme Court had at least recognized different rules regarding federal, state, and municipal taxpayer standing in various settings. *See id.* at 1532. We did not take that opportunity to compare the *Doremus* requirement of a pocketbook injury for state taxpayer standing and the *Frothingham* requirement of a municipal expenditure for municipal taxpayer standing. *Id.*

is only available when there is an expenditure of municipal funds challenged; courts in other circuits often have applied *Doremus-like language to express this rule. See, e.g., District of Columbia Common Cause*, 858 F.2d at 4 (explicitly applying the *Doremus* rule to municipal taxpayers); *Freedom From Religion Found., Inc. v. Zielke*, 845 F.2d 1463, 1469-70 (7th Cir. 1988) (municipal taxpayers have standing to challenge the improper use of tax revenues but no standing where there has been no expenditure of city funds); *Hawley v. City of Cleveland*, 773 F.2d 736, 741-42 (6th Cir. 1985) (municipal taxpayers may enjoin improper municipal expenditures), *cert. denied*, 475 U.S. 1047 (1986); *Donnelly v. Lynch*, 691 F.2d 1029, 1031 (1st Cir. 1982) ("municipal taxpayers . . . have standing to sue to challenge allegedly unconstitutional use of their tax dollars"), *rev'd on other grounds*, 465 U.S. 668 (1984). In fact, even those who have taken a dimmer view on the breadth of state taxpayer standing than this court have recognized that municipal taxpayer standing requires no more injury than an allegedly improper municipal expenditure. *See, e.g., ASARCO, Inc. v. Kadish*, 490 U.S. 605, 612 (1989) (Kennedy, J.) (distinguishing the standing requirements for municipal taxpayers from those for state taxpayers, who must have a "direct injury" like that required of federal taxpayers)[9]; *Taub v. Commonwealth of Kentucky*, 842

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[9] In this portion of the opinion, which was otherwise written for an unanimous eight-justice Court, Justice Kennedy was able to garner only four votes; the other four justices expressly disavowed Justice Kennedy's discussion of the injury aspect of state taxpayer standing. *See* 109 S.Ct at 2053-54 (Brennan, J., concurring). In *Bell v. City of Kellogg*, 922 F.2d 1418 (9th

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F.2d 912, 917-19 (6th Cir.) (rejecting *Hoohuli* and restricting state taxpayer standing in non-establishment clause cases to that available to federal taxpayers, while leaving the municipal taxpayer standing rules unchanged), *cert. denied*, 488 U.S. 870 (1988); *Donnelly*, 691 F.2d at 1031 (the restrictive view of federal taxpayer standing may apply to state taxpayer standing as well, but not to municipal taxpayer standing). Thus, we conclude that municipal taxpayer standing simply requires the "injury" of an allegedly improper expenditure of municipal funds, and in this way mirrors our threshold for state taxpayer standing.

Our next inquiry is whether appellants have, in fact, established the requisite "pocketbook" injury. In *Hoohuli*, state taxpayers challenged a Hawaiian program which was designed to disburse benefits to state residents who were descendants of the aboriginal inhabitants of the islands. The program, established pursuant to an amendment to the state constitution, involved the expenditure of tax dollars through an administrative division (the Office of Hawaiian Affairs) created to implement the amendment. *Hoohuli*, 741 F.2d at 1172. The taxpayers protested the " 'appropriating, transferring, and spending. . . . of taxpayers' money from the General Fund of the State Treasury. . . . ' " *Id.* at 1180. The taxpayers

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Cir. 1991), we implied some sympathy toward Justice Kennedy's view. *See id.* at 1423 (citing Justice Kennedy's opinion for state taxpayer standing principles). However, we also made clear that *Hoohuli* remained the controlling circuit precedent. *See id.* (citing *Hoohuli*). *Bell* should not be interpreted as altering the law of this circuit on state taxpayer standing.

alleged that the program saddled them with an additional tax burden and that the revenues would be unlawfully spent to support the "class" of Native Hawaiians. *Id.* The court found the case to fit the description of a "good-faith pocketbook action" under *Doremus*. *Id.*

[4] Similarly, appellants' allegations satisfy the *Doremus* pocketbook injury requirement for standing. They have set forth their status as state and municipal taxpayers and specifically have stated the amount of funds appropriated and allegedly spent by the taxing governmental entities as a result of the Good Friday holiday.

[5] The government contends that taxpayers as such cannot have standing to challenge section 8-1 because the bare declaration of Good Friday as a state holiday does not, standing alone, involve any expenditure of tax revenues. This argument cannot prevail. Legislative enactments are not the only government activity which the taxpayer may have standing to challenge. *See id.* (contrasting state taxpayer's ability to challenge executive conduct with federal taxpayer's) (quoting *Public Citizen, Inc. v. Simon*, 539 F.2d 211, 218 n.30 (D.C. Cir. 1976)); *see also Bowen v. Kendrick*, 487 U.S. 589, 618-20 (1988) (federal taxpayers have standing to challenge executive or administrative grants made pursuant to Congress' taxing and spending powers); *Everson v. Board of Educ.*, 330 U.S. 1 (1947) (assuming without question that school district taxpayer has standing to challenge school board reimbursement of parents for public transportation fares incurred by their children traveling to parochial schools); *District of Columbia Common Cause*, 858 F.2d at 8-9 (municipal

taxpayers may challenge District of Columbia's expenditure of public funds to influence the outcome of an initiative); *Hawley*, 773 F.2d at 741-42 (municipal taxpayers may challenge city lease of airport terminal space to church where the lease agreement could have a detrimental impact on the public fisc). The complaint asserts that section 8-1 proclaims a state holiday in violation of the federal and state constitutions, and that state and municipal tax revenues fund the paid holiday for government employees. The collective bargaining agreements entered into by the government incorporate the challenged statute. In our view, this allegation identifies an expenditure of public funds sufficiently related to appellants' constitutional claim.

2

Having recognized an injury allegedly suffered by the taxpayer, we now consider the causation and redressability requirement. Causation and redressability are essentially identical requirements where the remedy is an order to desist. *See Allen v. Wright*, 468 U.S. 737, 751 (1984) (discussing elements of standing); *District of Columbia Common Cause*, 858 F.2d at 5 (considering municipal taxpayer standing).

The district court impliedly found that appellants have established causation and redressability. *Cammack*, 673 F. Supp. at 1528 (determining that the injury would be remedied by a favorable decision). Appellants' asserted injury is the impermissible advancement of religion effected by the recognition of Good Friday as a state holiday and the expenditure of tax revenues to public employees for not working on that day. "If this court

strikes down Hawaii Rev. Stat. § 8-1 as constitutionally flawed, the alleged entanglement between the State of Hawaii and religion would be terminated." *Id.* Ceasing the government's expenditure of public monies on the holiday could be accomplished by voiding some portions of the collective bargaining agreements on public policy grounds, or at the least by requiring that the agreements be revised in the next round of contract negotiations. *Id. See generally District of Columbia Common Cause*, 858 F.2d at 5 ("The injury – misuse of public funds – is redressed by an order prohibiting the expenditure.") (citations omitted).

3

In summary, we conclude that appellants have standing as both state and municipal taxpayers to challenge the expenditure of tax revenues on paid leave days for the Good Friday holiday. Appellants have asserted the necessary injury – actual expenditure of tax dollars – and that a successful challenge would remedy the injury. This notion of standing is consistent with the traditional judicial hospitality extended to establishment clause challenges by taxpayers generally. *See, e.g., School Dist. of Grand Rapids v. Ball*, 473 U.S. 373, 380 n.5 (1985) (listing cases involving establishment clause challenges by state taxpayers to programs aiding nonpublic schools); Fletcher, *The Structure of Standing*, 98 Yale L.J. 221, 267-72 (1988) (describing, with some skepticism, the limited establishment clause exception to the general rule against federal taxpayer standing).[10]

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[10] Our conclusion renders consideration of other possible bases for standing – the denial of access to state facilities and services, some plaintiffs' status as public employees – unnecessary.

IV

The first amendment provides that "Congress shall make no law respecting an establishment of religion. . . ." U.S. Const. amend. I. The establishment clause is made applicable to the states by the fourteenth amendment. *Everson*, 330 U.S. at 5.

[6] Recently the Supreme Court stated that it "has come to understand the Establishment Clause to mean that government may not promote or affiliate itself with any religious doctrine or organization." *County of Allegheny v. ACLU*, 492 U.S. 573, 109 S.Ct. 3086, 3099 (1989). The establishment clause, however, "permits government some latitude in recognizing and accommodating the central role religion plays in our society." *Id.* at 3135 (Kennedy, J., concurring and dissenting) (citing *Lynch v. Donnelly*, 465 U.S. 668, 678 (1984)).

A

The government argues that this case is controlled by *Marsh v. Chambers*, 463 U.S. 783 (1983). In *Marsh*, the Court upheld the Nebraska state legislature's practice of opening its daily sessions with a prayer from an official chaplain, who was compensated for his services from the state treasury. The Court explained that legislative prayer was "deeply embedded in the history and tradition of this country[,] [f]rom colonial times through the founding of the Republic and ever since." 463 U.S. at 786.

[7] Hawaii's recognition of Good Friday stems back to its days as a territory; the holiday has been celebrated

for longer than Hawaii has even been a state. Nonetheless, it cannot be said that the Good Friday holiday is as deeply embedded in the fabric of the state as was legislative prayer in *Marsh*. We are reluctant to extend a ruling explicitly based upon the "unique history" surrounding legislative prayer, *id.* at 791, to such a different factual setting. As the Court noted recently, the impact of the activities challenged in *Marsh* were largely confined to the internal workings of a state legislature. *See County of Allegheny*, 109 S.Ct. at 3106 n.52. In contrast, a public holiday can affect the entire populace. We reject the government's contention that *Marsh* controls the disposition of this case.

B

Although the Supreme Court has rejected any absolute approach in applying the establishment clause, it has generally relied upon the test first enunciated in *Lemon v. Kurtzman*, 403 U.S. 602 (1971). *Mueller v. Allen*, 463 U.S. 388, 394 (1983); *accord Board of Educ. v. Mergens*, 110 S. Ct. 2356, 2370 (1990) (plurality opinion).[11]

[8] In *Lemon*, the Court stated:

> Every analysis in this area must begin with consideration of the cumulative criteria developed

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[11] Although the *Lynch* Court insisted that it was not confined to the *Lemon* test in analyzing establishment clause cases, *see* 465 U.S. at 679, in fact in only one such case over the past twenty years had the Court failed to apply it: *Marsh v. Chambers*. *See also Larson v. Valente*, 456 U.S. 228, 252-55 (1982) (applying one prong of *Lemon* test after stating that its application "is not necessary to the disposition of the case before us").

> by the Court over many years. Three such tests may be gleaned from our cases. First, the statute must have a secular legislative purpose; second, its principal or primary effect must be one that neither advances nor inhibits religion; finally, the statute must not foster "an excessive government entanglement with religion."

Lemon, 403 U.S. at 612-13 (quotation and citation omitted). The challenged statute must satisfy all three prongs of the *Lemon* test to comport with the establishment clause. *Edwards v. Aguillard*, 482 U.S. 578, 583 (1987).

1

The first prong of the *Lemon* test requires that the statute at issue have "a secular legislative purpose." *Lemon*, 403 U.S. at 612. Generally, in applying this prong, the Supreme Court has considered whether the purpose of the legislation was to endorse religion. *County of Allegheny*, 109 S. Ct. at 3100. Government endorsement of religion has been found when the government conveys or attempts to convey a message that a particular religious belief is favored or preferred, or when it promotes " 'one religion or religious theory against another or even against the militant opposite.' " *Id.* at 3101 (quoting *Epperson v. Arkansas*, 393 U.S. 97, 104 (1968) (striking down statute prohibiting teaching evolution)). In *County of Allegheny*, the Court reiterated that it "squarely rejects any notion that this Court will tolerate some government endorsement of religion." *Id.* at 3102 (citing *Lynch*, 465 U.S. at 690 (O'Connor, J., concurring)).

a

[9] The purpose prong is clearly violated when there is no legitimate secular purpose for the legislation. *See, e.g., Edwards,* 482 U.S. at 585-89 (striking down a statute forbidding the teaching of evolution in public schools without accompanying instruction in "creation science"); *Wallace v. Jaffree,* 472 U.S. 38, 56-60 (1985) (striking down a statute mandating a period of silence in public schools for meditation or voluntary prayer). If the Court can describe the "actual purpose" of the act as religious, due to an absence of sincerely held, legitimate secular purpose, then the legislation must fall. *See id.* at 56 (quoting *Lynch,* 465 U.S. at 690 (O'Connor, J., concurring)) (stating "actual purpose" test).

When there are both religious and legitimate, sincere secular purposes motivating legislation, it appears that the existence of the secular purpose will satisfy the first *Lemon* prong. *See id.* ("[N]o consideration of the second or third criteria is necessary if a statute does not have a clearly secular purpose. For even though a statute that is motivated in part by a religious purpose may satisfy the first criterion, . . . the First Amendment requires that a statute must be invalidated if it is *entirely* motivated by a purpose to advance religion.") (citations omitted, emphasis added). In *Lynch v. Donnelly,* the Court noted that the city of Pawtucket had "a" secular purpose for its creche display, and therefore the purpose prong was satisfied. *See* 465 U.S. at 681. The Court rejected the argument that the government's purpose must be entirely secular. *See id.* n.6. ("Were the test that if the government must have 'exclusively secular' objectives, much of the

conduct and legislation this Court has approved in the past would have been invalidated.").

[10] The Supreme Court most recently examined the secular purpose prong of the *Lemon* test in *Bowen v. Kendrick*, 487 U.S. 589 (1988). In that case, the Court upheld the Adolescent Family Life Act, which permitted federal grant money to be awarded to organizations, including religious organizations, providing care to pregnant adolescents or adolescent parents. The Court stated that a statute will fail the purpose prong "only if it is motivated wholly by an impermissible purpose." *Id.* at 602. The Court observed that the challenged statute appeared to be "motivated primarily, if not entirely, by a legitimate secular purpose." *See id.* Thus, it was indisputable that "religious concerns were not the *sole motivation* behind the Act" and it could not be said that the Act "lacks *a legitimate* secular purpose." *See id.* at 602-03 (emphasis added). Looking beyond the face of the statute, the Court concluded that "the parts of the statute to which appellees object were *also* motivated by *other*, entirely legitimate secular concerns." *See id.* at 603 (emphasis added). Because there were legitimate secular purposes, it could not be said that Congress' " 'actual purpose' . . . was one of 'endorsing religion.' " *See id.* (quoting *Edwards*).[12]

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[12] The dissent criticizes our reliance upon *Kendrick* in discerning the correct formulation of this prong of the *Lemon* test. *Kendrick* is both the most recent Supreme Court establishment clause case examining the purpose prong, and the only case since *Lynch* which addressed competing secular and sectarian

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[11] In reviewing a challenged statute for a secular purpose, we must be "reluctant to attribute unconstitutional motives to the states, particularly when a plausible secular purpose for the State's program may be discerned from the face of the statute." *Mueller*, 463 U.S. at 394-395; *see also* Note, *The Transfiguration of the* Lemon *Test: Church and State Reign Supreme in* Bowen v. Kendrick, 32 Ariz. L. Rev. 365, 369-71 (1990) (describing Supreme Court's reluctance to deem legislation violative of the first prong of the *Lemon* test in the face of a plausible legislative purpose); *id.* at 385 ("Any avowed legislative purpose will be valid, even if it coincides with a purely sectarian [enterprise]."). The statement of such purpose, however, must be sincere and not a sham. *Edwards*, 482 U.S. at 586-87; *see also Kendrick*, 487 U.S. at 604 (quoting *Edwards*) (stating that Congress' expressed purposes were sincere). In determining the legislative purpose, courts may consider "the statute on its face, its legislative history, or its interpretation by a responsible administrative agency." *Edwards*, 482 U.S. at 594. Courts may also consider the

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purposes. Nowhere in *Kendrick* is there even a hint that the Court was searching for a *primary* purpose.

When, in contrast to the situation which we face here, only *one* legislative purpose animates a governmental act, then it is sound to evaluate such "actual" purpose. In the cases cited by the dissent to justify an "actual" purpose analysis, the Court was faced with *no* legitimate secular purpose whatsoever, and understandably focused upon the legislature's one "actual" purpose. *See Edwards*, 482 U.S. at 585-89; *Wallace*, 472 U.S. at 56-60; *Stone v. Graham*, 449 U.S. 39, 41 (1980) (per curiam).

historical context of the statute and the specific sequence of events leading to the passage of the statute. *Id.* at 595.[13]

b

Given this guidance for the appropriate application of the purpose prong of the *Lemon* test, we turn to the facts of this case. The legislative history of section 8-1 and its predecessors informs us as to its purpose.

[12] An examination of the legislative history surrounding the 1941 bill, which ultimately became law, and the earlier bills, which failed to establish a Good Friday holiday, demonstrates that the primary concern motivating selection of the holiday was simply timing. For example, the 1941 bill provided for the creation of two new holidays, Lincoln's Birthday and Good Friday. It is clear from the Senate Standing Committee report

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[13] The dissent's fear that our formulation of the purpose test "effectively gut[s] this prong," *see* Dissent at 10885, is misplaced. The dissent worries that a creche or star of David could be installed on government buildings for the legitimate, secular purpose of aesthetics, and thus presumably would survive the first *Lemon* prong. This is no objection to the *Kendrick* formulation of the purpose prong. For one thing, even under the dissent's version of the test, if aesthetics were the "primary" purpose behind the legislature's actions, the display would pass the dissent's test as well. More to the point, the display would almost certainly fall on the second, "effects" prong of the *Lemon* test, described below. *See County of Allegheny*, 109 S. Ct. at 3103-05, 3112-15 (determining constitutionality of creche and menorah displays on "effects" prong). A three-pronged test need not be recrafted simply because one may hypothesize an unconstitutional act which survives one of the prongs.

accompanying the bill that the committee was most interested in the timing of the proposed new holidays:

> This bill designs to add Lincoln's Birthday and Good Friday to the list of territorial holidays.
>
> Your committee feels that Good Friday should be set aside as a legal holiday but feels that, inasmuch as Washington's Birthday is a legal holiday and falls within the short month of February, to have another holiday within that month would be inadvisable.

Haw. Sen. Stand. Comm. Rep. No. 296 (H. Bill No. 154), *reprinted in* 1941 Haw. Sen. J. 710. Nothing in the legislative history concerning the 1941 bill suggests a religious motivation for its ultimate passage. Indeed, the legislature's approval of both proposed holidays and the governor's expressed opposition, because "the holidays were getting a bit thick about that time of year," betray no particular interest in the secular or sectarian origins of either day.

The legislature's consideration of earlier attempts to have Good Friday declared a public holiday are similarly devoid of sectarian influences.[14] A 1929 bill proposing establishment of Good Friday as a legal holiday was tabled because the state senate's Committee on Judiciary determined "that there are already enough legal holidays." Haw. Sen. Stand. Comm. Rep. No. 225 (Sen. Bill No. 136), *reprinted in* 1929 Haw. Sen. J. 727. A second bill

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[14] Although the earlier bills did not become law, their legislative history is relevant as the history of the 1941 bill which enacted Good Friday as a legal holiday. *See Edwards*, 482 U.S. at 594.

was tabled in 1931 because "[y]our Committee sees no good reason for adding to the number of Territorial holidays now prescribed by law." Haw. Sen. Stand. Comm. Rep. No. 239 (H. Bill No. 297), *reprinted in* 1931 Haw. Sen. J. 803.

In 1939, the Hawaii Territorial Legislature passed a bill designating Good Friday as a public holiday. The bill was vetoed by the governor, again due to concerns about the number of holidays already recognized in Hawaii. *See* Governor's Veto Message, H. Bill No. 39, May 3, 1939 ("I have had many objections from business men throughout the Territory to creating additional holidays and I see no reason for adding to those which we now have."). Accompanying that bill was the following committee report:

> There are now ten legal holidays in the Territory, including Thanksgiving, plus primary and general election days. Public sentiment is divided on the advisability of creating Good Friday a legal holiday. Some feel that we already have too many holidays to the detriment of both private and public business. On the other hand, others feel equally strongly that Good Friday being in theory at least a day of solemn religious observance by the members of the various churches and religious denominations should be given legal sanction. More and more churches are now conducting the three-hour service on that day and many business houses are allowing their employees to take time off for this purpose. If the legislature should feel that we should have more legal holidays than we now have, it would seem that in view of the religious significance of Good Friday observance of this

> day would have as much justification as Thanksgiving or Christmas.

Haw. H. Stand. Comm. Rep. No. 254 (H. Bill No. 39), *reprinted in* 1939 Haw. H.J. 890.

[13] The district court concluded that a fair reading of the 1939 committee report demonstrates that the primary purpose of the bill was to have more legal holidays. We happen to agree, recognizing, of course, that this clearly secular purpose need not even be "primary" to satisfy the purpose prong. Although the passage recognizes that some people consider Good Friday to be a " 'solemn religious observance,' " the legislative purpose for the bill was that Hawaii " 'should have more legal holidays.' " *Cammack*, 673 F.Supp. at 1534 (quoting committee report). Read in the context of the earlier, tabled bills, the governor's veto of the 1939 bill, and the 1941 enactment, it seems clear that the statute had at least *a* legitimate, sincere secular purpose.

[14] Furthermore, even to the extent that an improper purpose could be gleaned from the statute's legislative history, that would not compel a finding of improper purpose now, some fifty years later. *See McGowan v. Maryland*, 366 U.S. 420, 445 (1961) (noting that the *present* purpose of Sunday closing laws is to provide a uniform day of rest of all, regardless of the religious origins of the laws). The most ardent proponents of the statute in this litigation are the labor unions who have incorporated the statutory holidays into their collective bargaining agreements with the state and local governments. This is a strong indicant that the purpose animating the challenged act is not so much state sponsorship of religion as

state sensitivity to the concerns of organized labor. *See id.* at 435 (noting involvement of labor groups in passage of Sunday closing laws); *Two Guys from Harrison-Allentown, Inc. v. McGinley*, 366 U.S. 582, 595 (1961) (the challenged Sunday blue law "was promoted principally by the representatives of labor and business interests"); *Franks v. City of Niles*, 29 Fair Empl. Prac. Cas. (BNA) 1114, 1117 n.5 (N.D. Ohio 1982) (rejecting establishment clause challenge to municipal Good Friday holiday, in part because of union involvement in selection of recognized holidays).

C

[15] It is of no constitutional moment that Hawaii selected a day of traditional Christian worship, rather than a neutral date, for its spring holiday once it identified the need. The Supreme Court has recently identified as an "unavoidable consequence of democratic government" the majority's political accommodation of its own religious practices and corresponding "relative disadvantage [to] those religious practices that are not widely engaged in." *See Employment Div. v. Smith*, 110 S. Ct. 1595, 1606 (1990). "[T]he government may (and sometimes must) accommodate religious practices and . . . may do so without violating the Establishment Clause." *Hobbie v. Unemployment Appeals Comm'n*, 480 U.S. 136, 144-45 (1987).[15] When applying the first prong of the *Lemon* test,

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[15] This and the cases which are discussed below make clear that "accomodation" is not a principle limited to "burdens on the free exercise of religion," despite Justice

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the secular purpose need not be unrelated to religion; "[r]ather, *Lemon*'s 'purpose' requirement aims at preventing the relevant governmental decisionmaker . . . from abandoning neutrality and acting with the intent of promoting a particular point of view in religious matters." *Corporation of the Presiding Bishop of the Church of Jesus Christ of Latter-Day Saints v. Amos*, 483 U.S. 327, 335 (1987).

In *Zorach v. Clauson*, 343 U.S. 306 (1952), the Court rejected an establishment clause challenge to a program whereby public schools released students for a limited time for off-campus religious instruction. On behalf of the Court, Justice Douglas explained that a legislative act motivated by a legitimate secular purpose is not unconstitutional simply because it accommodates the religious practices of some citizens:

> When the state . . . cooperates with religious authorities by adjusting the schedule of public events to sectarian needs, if follows the best of our traditions. For it then respects the religious nature of our people and accommodates the public service to their spiritual needs. . . . The government must be neutral when it comes to competition between sects. It may not trust any sect on any person. It may not coerce anyone to attend church, to observe a religious holiday, or to take religious instruction. But it can close its

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Blackmun's remark suggesting the contrary in *County of Allegheny*. *See* 109 S. Ct. at 3105 n.51. The *County of Allegheny* footnote does not purport to describe the outer limits of permissible accommodation.

> doors or suspend its operations as to those who want to repair to their religious sanctuary for worship or instruction.

Id. at 313-14. The Court explicitly rejected the view that "separation of Church and State means that public institutions can make no adjustments of their schedules to accommodate the religious needs of the people." *Id.* at 315. The Court described such a view as "a philosophy of hostility to religion" which it could not read into the Bill of Rights. *See id., see also Gallagher v. Crown Kosher Super Market of Massachusetts, Inc.*, 366 U.S. 617, 627 (1961) (plurality) ("But because the State wishes to protect those who do worship on Sunday does not mean that the State means to impose religious worship on all.") (citing *Everson*, 330 U.S. at 16); *cf. Lynch*, 465 U.S. at 710 (Brennan, J., dissenting) ("When government decides to recognize Christmas Day as a public holiday, it does no more than accommodate the calendar of public activities to the plain fact that many Americans will expect on that day to spend time visiting with their families, attending religious services, and perhaps enjoying some respite from preholiday activities.") (citing *Zorach*).

Hawaii's compliance with the spirit of *Zorach* favorably compares with California's improper recognition of Good Friday in *Mandel v. Hodges*, 54 Cal. App. 3d 596, 127 Cal. Rptr. 244 (1976). In *Mandel*, the Governor of California ordered the closing of state offices on Good Friday between the hours of noon and 3:00 p.m. state employees were paid for the three hours of closure. The California Court of Appeal reasoned that the order "cannot plausibly be characterized as serving any 'secular purpose.' " *Mandel*, 54 Cal. App. 3d at 612, 127 Cal. Rptr. at 254.

Unlike the instant case, the time off in California coincided purposefully with the traditional time for worship. Moreover, the personnel manual explaining the reason for the Governor's order stated: " '[i]nasmuch as state offices are closed from 12:00 to 3:00 p.m. on Good Friday, employees are given these hours off *for worship.*' " *Id.* (emphasis in *Mandels*). In this case, however, the employees have the entire day off, not just the three hours associated with the Christian worship period. Appellants concede that Hawaiian public employees are not encouraged in any way to use the holiday for worship.

[16] We conclude that the Hawaii statute has a legitimate, sincere secular purpose, specifically to provide Hawaiians with another holiday, and thus is not motivated "wholly by an impermissible purpose." *Kendrick*, 487 U.S. at 602. There is nothing impermissible about considering for holiday status days on which many people choose to be absent from work for religious reasons. That the state legislature was able to accomplish its secular purpose and at the same time accommodate the widespread religious practices of its citizenry is hardly a reason to invalidate the statute. The statute satisfies the purpose prong of the *Lemon* test.

[17] We next consider whether the Good Friday holiday violates the second prong of the *Lemon* test, which requires examining whether the primary effect of section 8-1 is the advancement of religion. *Lemon*, 403 U.S. at 612. "[A]n important concern of the effects test is whether the symbolic union of church and state effected by the challenged governmental action is sufficiently likely to be perceived by adherents of the controlling denominations

as an endorsement, and by the nonadherents as a disapproval of their religious choices." *School Dist. of Grand Rapids*, 473 U.S. at 390; *accord Mergens*, 110 S. Ct. at 2371-72 (plurality).

In *McGowan v. Maryland*, the Supreme Court examined whether the Sunday Closing Laws violated the establishment clause because Sunday is predominantly the Sabbath day for Christians. *See* 366 U.S. at 431. Chief Justice Warren's opinion for the Court extensively traced the overtly sectarian origins of such laws. *See id.* at 431-35. As indicated earlier, the Court noted that the proponents of such laws had grown to include secular (particularly labor) organizations. *See id.* at 435. The Court concluded that such laws now had an overriding purpose and effect of establishing a uniform day of rest for the community, rather than of promoting the Christian religion. *See id.* at 444-45. The Court stated that "[t]he present purpose and effect of most of [the laws] is to provide a uniform day of rest for all citizens; the fact that this day is Sunday, a day of particular significance for the dominant Christian sects, does not bar the State from achieving its secular goals." *Id.* at 445.

[18] The Sunday Closing Laws provide an apt analogy to Hawaii's ongoing sanction of Good Friday as a legal holiday. Sunday was an appropriate choice for a weekly uniform day of rest because the community to a large degree already so regarded Sunday, due to its religious significance and (no doubt) to the long tradition of Sunday Closing Laws:

> Sunday is a day apart from all others. The cause is irrelevant; the fact exists. It would seem unrealistic for enforcement purposes and perhaps

> detrimental to the general welfare to require a State to choose a common day of rest other than that which most persons would select of their own accord.

Id., at 452 (internal footnote omitted). Similarly, given that the evidence in this case informs us that large numbers of Hawaiians observe Good Friday, the legislature cannot be faulted for not selecting a different spring day for a "common day of rest." Many Christians presumably will take at least part of the day off anyway, in order attend religious services, and non-Christians have enjoyed the holiday for fifty years – the entire working life of the vast majority of the public workforce. No enforcement of religion is implicated merely because the legislature is cognizant of these truths. That the special status of Good Friday derives from its religious origin is no more relevant than Sunday's status as the sabbath for the dominant Christian sects; "[t]he cause is irrelevant."

[19] The traditional celebrations of Sundays which so moved the *McGowan* Court, such as family outings and trips to the country, *see id.* at 451-52, are simply the expected benefits of a uniform day of rest. Exactly the same sorts of activities occur on any widely observed public holidays (with the probable exception of Christmas, which is imbued with different rituals) and even on Saturdays. The record evidence on the impact of the Good Friday holiday in Hawaii suggests nothing inconsistent with the observations made in *McGowan*. For example, the Good Friday holiday has become a popular shopping day in Hawaii and businesses have benefited from the three-day weekend created as a result of the

holiday. *Cammack*, 673 F. Supp. at 1535-36.[16] Similarly, citizens are better able to enjoy the many recreational opportunities available in Hawaii. *Id.* at 1536. Such evidence indicates that Hawaii's Good Friday holiday, at least at this late date, fifty years after enactment, cannot be regarded as an endorsement of religion any more than Sunday closing laws may.

In fact, Hawaii's adoption of Good Friday as a legal holiday could be viewed as less "coercive" or "endorsing" of religion than the Sunday blue laws. Under Hawaii's scheme, recognition of the holiday is simply accomplished by closing the office doors; the freed employees may enjoy virtually any leisure activity imaginable. In contrast, the Sunday Closing Laws were originally designed to funnel people into church. *See, e.g., McGowan*, 366 U.S. at 432 (quoting the English law applicable to the colonies at the time of the American Revolution). Thus, most leisure activities were restricted. Even at the time the laws were examined in 1961, there were many limitations on the types of establishments which could be open. *See, e.g., id.* at 423 (Maryland law required closure of dancing halls, opera houses, and bowling alleys); *Two Guys from Harrison-Allentown, Inc.*, 366 U.S. at 585 (Pennsylvania's blue law "generally forbids all worldly employment, business and sports on Sunday");

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[16] The potential effect on business of a Good Friday holiday was very much on the legislature's mind in considering establishment of the holiday. *See* Haw. H. Stand. Comm. Rep. No. 254 (H. Bill No. 39),*reprinted in* 1939 Haw. H.J. 890 (noting that some believed that too many holidays had a detrimental impact on business, but that many businesses were releasing employees to attend Good Friday services anyway).

Gallagher, 366 U.S. at 620 (Massachusetts law made "generally unlawful Sunday attendance or participation in any public entertainments except for those which are duly licensed locally, conducted after 1 p.m., and are in keeping with the character of the day and not inconsistent with its due observance"). Such Court-approved strictures would seem to broadcast the government's endorsement of the religious purpose of the sabbath, as expressed in the Fourth Commandment, in a far more obvious manner than Hawaii's simple release of its workforce to do whatever tickles the fancy.

[20] The breadth of impact of section 8-1, on its face and by its incorporation into the collective bargaining agreements, contributes to the conclusion that the statute's effect is simply the creation of a paid leave day for many state employees and not the endorsement of religion. Christian employees are not singled out for the paid holiday.[17] Good Friday is a paid leave day for all employees covered by the collective bargaining agreements, regardless of individual beliefs. *Compare Committee for Public Educ. & Religious Liberty v. Nyquist*, 413 U.S. 756 (1973) (striking down program mostly benefitting parents

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[17] In *Zorach*, the Court upheld a program under which public school students who wished to partake in religious instruction were released from class, for a limited time, to do so, although students who did not receive such instruction were required to remain at their public school. *See* 343 U.S. at 308-09. No classroom studies were conducted for the remaining students during the release time period. *Id.* at 309. Thus, it does not appear necessary to the constitutionality of a program under the establishment clause that the program impact adherents and nonadherents equally.

of parochial school children) *with Board of Educ v. Allen*, 392 U.S. 236 (1968) (permitting textbook loans to parochial school children under a program which benefits all). The paid leave is for the entire day and not only for the three hours associated with the traditional Christian observance of Good Friday. *Compare Cammack*, 673 F. Supp. at 1537 (no evidence in the record that pubic employers encourage church attendance or any other form of religious activity on Good Friday holiday) *with Mandel*, 54 Cal. App. 3d at 612, 127 Cal. Rptr. at 254 (emphasizing limited closing period and explicit encouragement to worship in declaring an executive order closing state offices for a portion of Good Friday unconstitutional).

Another factor in measuring the effect of a governmental action which might be construed as endorsement of religion is context. *See County of Allegheny*, 109 S.Ct. at 3103-04. In *Lynch* and *County of Allegheny*, the issue was how far the government could go toward participating in or endorsing the religious celebration of Christmas. In each case, the Court approved the actual display of religious icons (a creche and menorah, respectively) which were suitably balanced by secular displays.

[21] Good Friday's mere placement on the roll of public holidays, along with other important days of secular and (in some cases) religious significance, diminishes the likelihood of an "endorsing" effect. *Cf. Lynch*, 465 U.S. at 710 n.16 (Brennan, J., dissenting) ("It is worth noting that Christmas shares the list of federal holidays with such patently secular, patriotic holidays as the Fourth of July, Memorial Day, Washington's Birthday, Labor Day and Veterans Day. We may reasonably infer from the

distinctly secular character of the company that Christmas keeps on this list that it too is included for essentially secular reasons.") (citation to federal statute omitted). Good Friday is surrounded by patriotic and historic dates which are all selected for their importance to the citizens of Hawaii. The government's action might best be termed a mere "acknowledgment" of religion. *See id.* at 692-93 (O'Connor, J., concurring) (voting to uphold creche display against establishment clause challenge). Viewed in this context, it is unlikely that an observer would regard Good Friday's inclusion as an endorsement of religion. Closing state offices on that day simply acknowledges Good Friday's status as a holiday observed widely enough (and long enough) that the secular purpose of establishing a uniform day of rest is appropriately achieved by selecting it.

[22] If Hawaii went further toward celebrating the religious elements of Good Friday, such as erecting displays concerning the crucifixion of Jesus, then the absence of secular aspects to counterbalance the religious would probably render the *display* (not necessarily the holiday) unconstitutional under *County of Allegheny*. Christmas displays are prone to establishment clause challenges because they move far beyond a simple governmental accommodation of Christians' desire to have a day to celebrate, and, without a sufficient secular context in which to place the display, cross the line into endorsement of the celebrating religion. Nothing in the display cases, however, provides support to the notion that the mere calendar recognition of such a holiday would have the effect of endorsing the religion. *See, e.g., Lynch*, 465

U.S. at 675-76 (describing nation's long history of recognizing Christmas and Thanksgiving holidays); *id.* at 710 (Brennan, J., dissenting) (recognition of Christmas as a public holiday merely accommodates the calendar of public activities to the citizenry's traditional Christmas observances). In fact, Hawaii's acknowledgment of the holiday lacks any reference whatsoever to religion, unlike the President's Thanksgiving Day proclamations. *See id.* at 675-76. The context of the Good Friday holiday, a minimal accommodation of the religious practices of some Hawaiians, decreases the likelihood of a public perception of endorsement.

Because the primary effect of the Good Friday holiday is secular, we cannot conclude that the holiday is unconstitutional merely because the holiday may make it easier to worship on that day for those employees who may wish to do so. "[T]he 'Establishment' Clause does not ban federal or state regulation of conduct whose reason or effect merely happens to coincide or harmonize with the tenets of some or all religions." *McGowan*, 366 U.S. at 442. Moreover " 'not every law that confers an "indirect," "remote," or "incidental" benefit upon [religion] is, for that reason along, constitutionally invalid.' " *Lynch*, 465 U.S. at 683 (quoting *Nyquist*, 413 U.S. at 771). We conclude that section 8-1 satisfies the effect prong of the *Lemon* test.

3

[23] The third prong of the *Lemon* test requires examining whether the Hawaii statute leads to "an excessive government entanglement with religion." *Lemon*, 403 U.S.

at 613 (quotation omitted). The entanglement prong seeks to minimize the interference of religious authorities with secular affairs and secular authorities in religious affairs. *See* L. Tribe, *American Constitutional Law* § 14-11, at 1226 (2d ed. 1988).

Appellants argue that the entanglement prong is not satisfied because the determination of the holiday depends upon the church's calculation of when Easter occurs each year. The required contact between state and religious bodies, in her view, amounts to excessive administrative entanglement.

Cases in which the Supreme Court has found excessive administrative entanglement often involve state aid to organizations or groups affiliated with religious sects, such as parochial schools. *See, e.g., Aguilar v. Felton*, 473 U.S. 402 (1985); *Roemer v. Board of Public Works*, 426 U.S. 736 (1976); *Levitt v. Committee for Public Educ. & Religious Liberty*, 413 U.S. 472 (1973); *Lemon*, 403 U.S. 602 (1971). Administrative entanglement is also likely where religious and public employees must work closely together. *See Aguilar*, 473 U.S. at 412-14 (program required on-site monitoring of sectarian schools by public authorities and coordinated planning by public and sectarian figures); *Walz v. Tax Comm'n*, 397 U.S. 664, 674-75 (1970) ("the questions are whether the involvement is excessive, and whether it is a continuing one calling for official and continuing surveillance"). None of these situations bear on Hawaii's presumed simple reference to an ecclesiastical calendar (or, more likely, the World Almanac) to determine the date of a public holiday.

[24] In *Lynch*, the Court examined whether there was administrative entanglement between the city and the church resulting from the city's creche display. Finding that there were no direct city expenditures for the maintenance of the creche and no evidence of contact between the city and the church regarding the creche, the Court concluded that "[t]here is nothing here . . . like the 'comprehensive, discriminating, and continuing state surveillance' or the 'enduring entanglement' present in *Lemon*." *Lynch*, 465 U.S. at 684 (quoting *Lemon* 403 U.S. at 619-22). In the case of Hawaii's Good Friday holiday, to the extent that the actual date of the holiday would be determined by resort to church calendars, any such entanglement would surely not be the kind of "comprehensive" and "enduring" entanglement the first amendment prohibits.[18]

Appellants also contend that section 8-1 fails because its passage has resulted in political divisiveness. This divisiveness is purportedly evidenced by the attempts of nonChristian religious groups, including Buddhists and

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[18] Nor are we persuaded by the reasoning of the Connecticut Supreme Court in *Griswold Inn, Inc. v. Connecticut*, 183 Conn. 552, 441 A.2d 16 (1981). Although the court found that excessive entanglement existed because Good Friday's actual date is determined by ecclesiastical calendars, the court also was faced with a significant additional wrinkle. In the challenged statute, Connecticut had banned the sale of liquor on Good Friday only. Thus, the state was forced to monitor alcohol sales on Good Friday and, in effect, "enforce observance of a religious holiday" by liquor licenses. 441 A.2d at 22. There is no such entanglement in Hawaii's simple closure of state offices.

Baha'is, to have significant days in their religious calendars declared legal holidays by the state legislature.

[25] Although political divisiveness has been considered in establishment clause cases, *see, e.g., Nyquist,* 413 U.S. at 796, it has never been relied on "as an independent ground for holding a government practice unconstitutional." *Lynch,* 465 U.S. at 689 (O'Connor, J., concurring); *see also Corporation of the Presiding Bishop of the Church of Jesus Christ of Latter-Day Saints,* 483 U.S. at 339 n.17 (quoting and following *Lynch*). In any event, we are unpersuaded that political divisiveness occurred as a result of the Good Friday holiday. There is no showing that the nonChristian sects' attempts to have certain days declared state holidays were prompted by enactment of the Good Friday holiday. Indeed, these "controversies" appear to have occurred some two or three decades after Good Friday's declaration as a legal holiday. We cannot conclude that the enactment of section 8-1 has resulted in political divisiveness. The Hawaii statute satisfies the entanglement prong of the *Lemon* test.

V

[26] It is difficult to imagine that the average Hawaiian citizen would view Hawaii's inclusion of Good Friday on a list of state holidays as any more a law establishing a religion than is the current inclusion of Christmas on the same list. *Cf. County of Allegheny,* 198 S. Ct. at 3121 (O'Connor, J., concurring) ("The question . . . , in short, is whether a reasonable observer would view such longstanding practices [including recognition of Thanksgiving as a public holiday] as a disapproval of their particular

religious choices, in light of the fact that they serve a secular purpose rather than a sectarian one and have largely lost their religious significance over time.") (citing L. Tribe, *American Constitutional Law* 1294-96 (2d ed. 1988)); *id.* at 3138 (Kennedy, J., concurring and dissenting) ("The Religion Clauses do not require government to acknowledge these holidays or their religious component; but our strong tradition of government accommodation and acknowledgment permits government to do so.").[19]

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[19] We do not accept the contention that the observation of "Good Friday" in the Western Christian world has become "secularized" in the same manner as Thanksgiving and Christmas celebrations have become in this country. Rather, we do not regard the distinction as constitutionally significant. What the *Lemon* test requires is that we inquire into the purpose and effect of Hawaii's recognition of this holiday. Hawaii's recognition of Good Friday as a public holiday, we conclude, is sufficiently focused toward its secular purpose and, after 50 years, has resulted in secular effects such that an objective observer, "acquainted with the text, legislative history, and implementation of the statute." *Wallace*, 472 U.S. at 76 (O'Connor, J., concurring), would not consider the day's recognition an endorsement of religion. *See* Comment, *Endorsing the Supreme Court's Decision to Endorse Endorsement*, 24 Colum. J.L. & Soc. Probs. 1, 17-18 (1990) (noting that the passage of time dulls any message of endorsement because of the significance of a change in status quo; "when a reasonable observer judges a government action, the tradition or novelty of the act is central to his or her analysis"); *see also Walz*, 397 U.S. 677-78 (stressing significance of long history of tax exemptions for religious organizations in weighing their constitutionality). The dissent's preoccupation with the differences between Christmas and Thanksgiving on the one hand, and Good Friday on the other, inevitably succumbs to tautology.

The Hawaii law does not require or endorse any religious activity, and the only public expenditure associated with the holiday is the continued pay accrued by public employees. We are persuaded that nothing more is "established" by the Hawaii statute than an extra day of rest for a weary public labor-force.

AFFIRMED

D.W. NELSON, Circuit Judge, Dissenting:

The holly and the ivy, jingling bells, red-nosed reindeer, and frosty snowmen this is not. What this case *is* about is Hawaii's endorsement, by means of a state holiday, of a day thoroughly infused with religious significance alone. Because I believe that such a state establishment of religion violates both the purpose and effects prongs of *Lemon v. Kurtzman*, 403 U.S. 602 (1971), I respectfully dissent.

I. PURPOSE

A.

The first prong of the *Lemon* test requires that "the statute . . . have a secular legislative purpose." *Id.* at 612. Though this seems rather straightforward, the Supreme Court has subsequently been less clear about how much secular purpose is required to satisfy the test. The critical question is whether *a* or *any* legitimate secular purpose is sufficient or whether the *actual* or *primary* purpose of the legislation must be secular. The majority believes that "a legitimate, sincere secular purpose" is sufficient. *Majority op.* at 10873. For support, it musters the language in *Lynch*

v. Donnelly, 465 U.S. 668 (1984), that "*a* secular purpose" is all that is required, *id.* at 681 n.6 (emphasis added), and in *Bowen v. Kendrick*, 487 U.S. 589 (1988), that only a statute "motivated wholly by an impermissible [i.e., religious] purpose" will fail the purpose prong. *Id.* at 602.

The majority's great reliance on these two cases, however, is troublesome in its selectivity, for the Court has also said quite a few times that more than *a* or *any* secular purpose is required. The most critical instance is Justice O'Connor's concurrence in *Lynch*, where she noted that the purpose prong "is not satisfied . . . by the mere existence of some secular purpose, however, dominated by religious purposes." *Lynch* at 690-91 (O'Connor, J., concurring).[1] Soon thereafter, a majority of the Court, in *Wallace v. Jaffree*, 472 U.S. 38 (1985), adopted Justice O'Connor's *Lynch* language in looking to " 'whether government's *actual purpose* is to endorse or disapprove of religion.' " *Id.* at 56 (quoting *Lynch* at 690 (O'Connor, J., concurring)) (emphasis added. *Edwards v. Aguilar*, 482 U.S. 578 (1987), later quoted the exact same language concerning "actual purpose." *Id.* at 585. That opinion also mentioned the "legislature's *preeminent* [not "wholly"] religious purpose," *id.* at 590 (emphasis added), its "predominate religious purpose," *id.*, the "preeminent purpose . . . to advance the religious viewpoint," *id.* at 591, and "the Act's primary purpose." *Id.* at 592. Previously,

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[1] It is noteworthy that Justice O'Connor provided the fifth vote for the *Lynch* majority. Therefore, since her concurrence explicitly rejects the notion that *any* secular purpose will do, the majority's cite of *Lynch* on this point is not a cite to a majority holding. The majority, then, is left only with *Kendrick* for support.

Stone v. Graham, 449 U.S. 39 (1980), held that posting the Ten Commandments in schools violated the purpose prong despite an avowed secular purpose. *See Lynch* at 691 (O'Connor, J., concurring).

Even *Kendrick*, which is the majority's only support for its explanation of the purpose prong, *see supra* n.1, cuts both ways. After initially positing a "wholly impermissible purpose" test, *id.* at 602, the Court reverses field in the penultimate sentence of its purpose section: "There is simply no evidence that Congress' *'actual purpose'* in passing the AFLA was one of 'endorsing religion.' " *Id.* at 604 (citing *Edwards* at 589 & 594) (emphasis added).[2]

Analysis of these cases thus reveals that the Supreme Court wishes courts to look to the actual or primary or predominant purpose, rather than to any legitimate secular purpose. The majority, however, does not even grapple with the dilemma of which formula to apply: any legitimate secular purpose or of the actual purpose. Instead, it simply invokes the first without refuting the second. The majority thus selects a formula that effectively reads the purpose prong out of the *Lemon* test.

I firmly believe that "primary" or "actual" secular purpose is both the test that the Supreme Court has articulated and a far preferable formulation. If a legislature need merely come up with *any* secular purpose that

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[2] In its most recent case on the Establishment Clause, which obviously postdates *Kendrick* the Court's liberal quoting from Justice O'Connor's *Lynch* concurrence makes it clear that the Court continues to adopt that reasoning. *See County of Allegheny v. American Civil Liberties Union*, 109 S. Ct. 3086, 3100-01 (1989).

is sincere and not a sham, we have effectively gutted this prong. For instance, a legislature could decide that a state building would be enlivened by decoration, surely a reasonable secular purpose, and then install a beautiful creche on its staircase or a decorated star of David on its lawn. Both could undoubtedly adorn otherwise dreary government buildings and thereby create an improved aesthetic appearance, but I cannot believe either would pass constitutional muster. A far more logical approach is to examine whether the central or actual purpose behind the government's actions was secular or religious.

B.

Having determined that courts must seek out the primary purpose, the obvious place to start is the legislative history. *Edwards v. Aguilar*, 482 U.S. 578, 594-95 (1987). Though I agree with the majority that the committee report on the 1939 bill is the best evidence of purpose, I cannot subscribe to the majority's exegesis of this report.

The majority believes that a reading of the long paragraph from the 1939 committee report, *quoted in majority op.* at 10869, demonstrates that "the legislative purpose for the bill was that Hawaii should have more legal holidays." *Id.* at 10869-70 (internal quotation omitted). I find such an interpretation baffling. The heart of this paragraph is the juxtaposition of the following two sentences:

> Some feel that we already have too many holidays to the detriment of both private and public business. On the other hand, others feel equally

> strongly that Good Friday being in theory at least a day of solemn religious observance by the members of the various churches and religious denominations should be given legal sanction.

Haw. H. Stand. Comm. Rep. No. 254 (H. Bill No. 39), *reprinted in* 1939 Haw. H.J. 890. This excerpt makes manifest that the division was *not* between those who thought that there were too many holidays and those who thought there were too few. On the contrary, the division was between those who wished to create Good Friday as a legal holiday *because of its religious significance* and those who felt there were too many holidays. In mentioning earlier tabled bills, the majority only reinforces the theory that earlier refusals to enact Good Friday as a holiday were finally overridden by the importance of religious observances of this holy day.

The citations to the legislative history of the 1941 bill, *see majority op.* at 10868, are similarly unhelpful to the majority. The committee report was responding to a bill proposing both Lincoln's Birthday and Good Friday as holidays. The committee "feels that Good Friday should be set aside as a legal holiday but feels that, inasmuch as Washington's Birthday is a legal holiday and falls within the short month of February, to have another holiday within that month would be inadvisable." Haw. Sen. Stand. Comm. Rep. No. 296 (H. Bill No. 154), *reprinted in* Haw. Sen. J. 710. This quotation makes no mention of why the committee felt Good Friday should be adopted as a legal holiday, only that dates governed the decision to reject Lincoln's Birthday. The majority thus greatly

strains its inference in claiming that Good Friday's selection was dictated by calendar concerns.

C.

Even if the primary purpose behind creating *a* new holiday was secular, the decision to choose the specific date of Good Friday was not. In other words, if we look at the decision in two parts – to create a holiday and then to pick a date – the second decision clearly bore a religious purpose. It is difficult to think of more perspicuous language than "in view of the religious significance of Good Friday." Rep. No. 254. Though the majority attempts to get around this, its efforts are unsuccessful. The committee report also noted that Good Friday is a "day of solemn religious observance," *Id.* The purpose of picking the date of the Friday before Easter was primarily motivated by religious concerns. There is no primary secular purpose for picking that date instead of any other.

The majority attempts to rebut this two-part analysis by relying on the principle of accommodation. There is no doubt that " 'the government may (and sometimes must) accommodate religious practices and that it may do so without violating the Establishment Clause.' " *Corporation of the Presiding Bishop v. Amos*, 483 U.S. 327, 334 (1987) (quoting *Hobbie v. Unemployment Appeals Comm'n.*, 480 U.S. 136, 144-45 (1987)). However, the Supreme Court has made equally clear that "[g]overnment efforts to accommodate religion are permissible *when they remove burdens* on the free exercise of religion." *County of Allegheny* at 3105 n.51 (emphasis added). *See id.* at 3121 (O'Connor, J., concurring) ("the government can accommodate religion

by lifting government-imposed burdens on religion"); *Wallance v. Jaffree*, 472 U.S. 38 (1985) (no need to accommodate because "no governmental practice impeding students from silently praying," *id* at 57 n.45); *Amos* (accommodation allowed because Congress imposed a "significant burden on a religious organization [by] requir[ing] it . . . to predict which of its activities a secular court will consider religious," *id.* at 336).[3]

Just as *County of Allegheny* found no burden on Christians wishing to display creches, the evidence has not established that any exists here for those who wish to observe Good Friday in a religious manner. In that case, "Christians remain free to display creches in their homes and churches," *County of Allegheny*, 109 S. Ct. at 3105 n.51, and here, Christians may take Good Friday off or seek leave to at least go worship for a few hours. To be sure, not to proclaim Good Friday a state holiday "deprives Christians of the satisfaction of seeing the government

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[3] The majority argues that "[t]he *County of Allegheny* footnote does not purport to describe the outer limits of permissible accommodation." *Majority op.* at 10871 n.15. Since they have come upon with no cases that push that limit further, their proposition is mere speculation and can hardly help us in this case.

Further, the discussion of *Zorach v. Clauson*, 343 U.S. 306 (1952), is unavailing: *Zorach* was decided before the *Lemon* test was articulated and has never been cited since by a majority of the Court on the issue of accommodation. Justice Kennedy in dissent in *County of Allegheny* relies on *Zorach* for an accommodationist argument, *see* 109 S. Ct. at 3135 (Kennedy, J., concurring in part and dissenting in part), but the present case represents no more of an example of accommodation than did the creche display.

adopt their religious message as [its] own, but this kind of government affiliation with particular religious messages is precisely what the Establishment Clause precludes." *Id.* Without this statute, Christians would not be prohibited from honoring Good Friday; rather, the day would simply not be a public holiday.

In sum, the actual purpose of the Hawaii's bill was to "give[ ] legal sanction" to the observance of Good Friday. Rep. No. 254. Since accommodation cannot save this statute, I believe that it is clearly violative of *Lemon*'s purpose prong and thus unconstitutional.

II. EFFECTS

The second prong of the *Lemon* test requires the statute's "principal or primary effect . . . [to] be one that neither advances nor inhibits religion." *Id.* at 612 (citation omitted). Justice O'Connor's concurrence in *Lynch* modified this somewhat, arguing that the key is "that a government practice not have the effect of communicating a message of government *endorsement* or disapproval of religion." *Id.* at 692 (O'Connor, J., concurring) (emphasis added). This "endorsement" test has since been adopted by the Court, as *County of Allegheny* has recently made clear. *See id.* at 3100 (noting cases that have used "endorsement"). The majority here, not in disagreement, uses the formula of whether the " 'challenged governmental action is sufficiently likely to be perceived by adherents of the controlling denominations as an endorsement, and by the nonadherents as a disapproval of their religious choices.' " *Majority op.* at 10873 (quoting *School Dist. of Grand Rapids v. Ball*, 473 U.S. 373, 390

(1985)). The difficulty, I believe, is that they do not follow their own test.

The majority supports its effects section with two different arguments. The first is that this case is similar to *McGowan v. Maryland*, 366 U.S. 420 (1961), where the Supreme Court upheld the constitutionality of Sunday closing laws. The second is that by placing Good Friday in the same *context* as other secular holidays, the state has negated any impermissible endorsement of religion. After discussing my objections to both of these theories, I will explain why I believe this to be a clear instance of state endorsement of religion.

A.

The majority's equation of *McGowan* with this case implies that Sundays and Good Friday at present have similar secular effect. To say these are of comparable secular magnitude is to argue that a candle and the sun are similar because they both give off light. While Sunday holds unique meaning for those of many faiths as well as those of none, Good Friday is still essentially a holiday with Christian connotations. As the majority noted in *McGowan:*

> [I]t is common knowledge that the first day of the week has come to have special significance as a rest day in this country. People of all religions and people with no religion regard Sunday as a time for family activity, for visiting friends and relatives, for late sleeping, for passive and active entertainments, for dining out, and the like . . . Sunday is a day apart from all others.

Id. at 451-52; *see also id.* at 507 (Frankfurter, J., concurring) ("For to many who do not regard it sacramentally, Sunday is nevertheless a day of special, long-established associations, whose particular temper makes it a haven *that no other day could provide.*") (emphasis added).

Good Friday, on the other hand, carries no such wide-ranging appeal. We need think only of the schoolchild who asks her teacher why she gets Sundays and Good Fridays off. The answer must be that the former are days of rest and the latter a commemoration of the death of Jesus Christ. Selecting a state holiday does much more than enable citizens to relax; it communicates a critical message about the state's priorities. *See, infra,* section II-C. While the present effect of Sunday is not to favor one sect over another, that of Good Friday endorses Christianity. As *County of Allegheny* underscored:

> Whatever else the Establishment Clause may mean . . . it certainly means at the very least that government may not demonstrate a preference for one particular sect or creed (including a preference for Christianity over other religions). The clearest command of the Establishment Clause is that one religious denomination cannot be officially preferred over another.

Id. at 3107 (internal quotation omitted).

The majority also argues that this holiday has been ongoing for fifty years and thus may be analogized to Sunday closing laws. Yet the majority earlier admitted that the "unique history" of legislative prayer in *Marsh v. Chambers,* 463 U.S. 783 (1983), did not apply to this case. *Majority op.* at 10863. Sunday has a history far more intertwined with our nation's founding than Nebraska's

legislative prayer. In fact, Sunday restrictions were in force two centuries before Nebraska even entered the union. *See McGowan*, 366 U.S. at 433. Thus if *Marsh* is not applicable to this case because Good Friday as a holiday has not attained the unique character of Nebraska legislative prayer, certainly *McGowan* cannot apply either. Furthermore, *County of Allegheny* points out that not "all accepted practices 200 years old and their equivalents are constitutional today." *Id.* at 3106. If 200 years does not necessarily suffice to sanitize an otherwise violative establishment of religion, then the fact alone that Hawaii's practice has occurred for 50 years is similarly of little value.[4]

The majority mentions, in addition, that Good Friday "has become a popular shopping day in Hawaii," *majority op.* at 10875, and notes the economic benefits to businesses because of the holiday. I do not gainsay the remunerative nature of the holiday for business, but this is an ancillary result, not a secular effect, of any state holiday. *See Lynch*, 465 U.S. at 685 ("That the display brings people into the central city, and serves commercial interests and benefits merchants and their employees, does not . . . determine the character of the display.").

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[4] *Marsh* and *McGowan* are cases that are largely based on particular laws' history being intertwined with the state's secular life. Good Friday should not receive similar judicial dispensation, for while "[t]here have been breaches of this command ["that one religious denomination cannot be officially preferred over another"] throughout this Nation's history, . . . they cannot diminish in any way the force of the command" *County of Allegheny*, 109 S. Ct. at 3107.

Finally, to argue that Christian employees alone are not given the day off is to erect a man of material flimsier than straw. The fact that such a statute would be so patently unconstitutional does not shed any light on the present one. Christians and nonChristians alike were free to gaze upon Allegheny's creche, but that quite obviously, did not cure the constitutional flaw.

B.

The Court in *County of Allegheny* reminds us of another crucial aspect of the effects prong: context. A majority of the Court noted that under *Lynch* "the effect of a creche display turns on its *setting*. Here, unlike in *Lynch*, nothing in the *context* of the display detracts from the creche's religious message." *Id.* at 3103-04 (emphasis added). The menorah in *County of Allegheny* was linked with a tree, the creche in *Lynch* was placed amidst other secular symbols, and the funds in *Bowen* were disbursed to religious and nonreligious groups, and all were upheld as constitutional. Without any countervailing secular context, the creche in *County of Allegheny* was found to have violated the Establishment Clause. Here the legislature has created a "creche alone" situation in its declaration of Good Friday as a state holiday. No secular mitigating factors appear to lend context to this decision or to offset the religious nature of this day.

The majority's context argument is that Good Friday's placement on the roll of public holidays amidst secular days diminishes its endorsing effect. *Majority op.* at 10878. The context, in other words, is the list of holidays. Such an argument cannot be maintained. This is

equivalent to saying that if the state erected secular displays on assorted sites, this would balance a creche on another site. Just as the context in that example should not be all displays anywhere in the state or even city, the context here cannot be all holidays, regardless of how temporally far apart.[5] Furthermore, under the majority's context rationale, the state could decide tomorrow that all of holy week or any of the numerous saints' days should be holidays and that their placement on the holiday roll would be balanced by all the other secular holidays. It seems that the majority would support as a state holiday any uniquely religious day on the grounds that because it is a state holiday, it must be of primarily secular content. A greater switch in cause and effect is difficult to imagine. The reason that the holiday roll is filled with patriotic

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[5] Even were we to buy into this dubious notion that the holiday roll should be the context, Good Friday is not aided. In such a circumstance, the only holidays with any religious origin – Thanksgiving, Christmas, and Good Friday – all belong to the Christian faith. Even Justice Kennedy, who thought that both displays in *County of Allegheny* were constitutional, agrees:

> [I]f a city chose to recognize, through religious displays, every significant Christian holiday while ignoring the holidays or all other faiths, the argument that the city was simply recognizing certain holidays celebrated by its citizens without establishing an official faith or applying pressure to obtain adherents would be much more difficult to maintain.

County of Allegheny, 109 S. Ct. 3139 n.3 (Kennedy, J., dissenting).

and secular days is because the state may not make any laws respecting the establishment of religion.[6]

The majority's other point in its discussion on context is that a state's "mere calendar recognition" of a religious holiday is less of an endorsement of religion than public displays of religious symbols. *Majority op.* at 10878-79. This argument is no more tenable than the last. "Mere calendar recognition" is a euphemism for "state-declared holiday." The majority believes that the state's declaration of a public holiday and its closing of state offices on a purely religious day is somehow less of an endorsement of Christianity than is the erection of a crucifix on state property, and it notes that the display cases have not held to the contrary. Those cases, though, have never discussed the constitutionality of state declarations of purely religious days as public holidays. I believe that such an establishment of religion is clearly more offensive than state decorations with religious themes.

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[6] The textual sentence that precedes Justice Brennan's footnote that the majority cites, *see majority op.* at 10878, states that "it is clear that the celebration of Christmas has both secular and sectarian elements." *Lynch*, 465 U.S. at 710 (Brennan, J., dissenting). His point is that *because* Christmas is secular, it is on the list of holidays. The footnote admittedly proves the obverse by saying that we may infer its secular context from the company it keeps. *Id.* at 667 n.16. The ultimate point, however, is that Justice Brennan does not state or imply that simple inclusion on the holiday roll confers secularity.

C.

Overall, I cannot believe that the establishment of Good Friday as a state holiday can survive the endorsement test. As Justice O'Connor stressed in her *County of Allegheny* concurrence,

> If government is to be neutral in matters of religion, rather than showing either favoritism or disapproval towards citizens based on their personal religious choices, government cannot endorse the religious practices and beliefs of some citizens without sending a clear message to nonadherents that they are outsiders or less than full members of the political community.

Id. at 3119 (O'Connor, J., concurring). In this case, the legislature sends the message to nonChristians that it finds Good Friday, and thus Christianity, to be a religion worth honoring, while their religion or nonreligion is not of equal importance. In fact, the government promotes Western Christians above Eastern Christians, whose Easter and Good Friday almost always fall on different dates. By declaring Good Friday a holiday, the state places its imprimatur on both the Christian rites and practices observed on that day and to Western Christianity in general. No other state holiday in the calendar bears anywhere near the religious implications of Good Friday, with the exception of Christmas, whose religious and secular traditions are intertwined. *See infra* section IV. Hawaii's benefit to religion is not "indirect," "remote," or "incidental," *see Lynch* at 683; on the contrary, it is an open and obvious bestowal of approval on a critical religious day for Western Christians.

To order time and mark its passing are unique means by which communities define themselves. In selecting particular state holidays, the polity does more than honor the past; it identifies the people, events, and values from which it draws inspiration and seeks guidance. The celebrations provide a sense of continuity with remote times, bestowing upon the present the virtues of the past. Hawaii's decision, therefore, should not be dismissed as a bagatelle or applauded simply because it provides an additional day of repose; on the contrary, it should be regarded as a weighty, solemn statement, at once reflecting and shaping the collectivity's character.

The majority, I fear, underestimates the importance of such decisions. And yet, we are reminded daily of their role and significance to people around the globe. The French Jacobins are perhaps the most apt example in their swift introduction of their own calendar, which bore new names for months and even dated their accession to power as Year I. In the Third World, victorious revolutionary movements are quick to solemnize historical dates: e.g., November 1st in Algeria, July 26th in Cuba. At this very moment we wonder how long October 17th will remain a national holiday in the Soviet Union. Indeed, the majority need not have searched so far in time or space, as fierce debates over the celebration of Martin Luther King Day attest to our own extreme sensitivity to this issue.

There is, as I have explained, good reason for such emotional reactions. By honoring a given day, the state *endorses* an event as a fair reflection of its beliefs; it *establishes* that event as a privileged repository of its values. Despite the potential for impassioned disputes, a

state is free to do this as far as secular occurrences are concerned – hence the 4th of July, Presidents' Day, Labor Day, or Memorial Day. But the First Amendment must exclude from this list those days that are remembered for their religious significance alone. Today, and with the blessing of the majority, we are told that it need not. I believe that by declaring Good Friday a state holiday, Hawaii has endorsed a day thoroughly infused with religious meaning; such endorsement has

> [t]he effect on minority religious groups, as well as on those who may reject all religion, . . . [of conveying] the message that their views are not similarly worthy of public recognition nor entitled to public support. It was *precisely this sort of religious chauvinism* that the Establishment Clause was intended forever to prohibit.

Lynch at 701 (Brennan, J., dissenting) (emphasis added) (internal footnote omitted). I am unable to countenance such an endorsement.

III. ENTANGLEMENT

Lemon's third prong states that "the statute must not foster an excessive government entanglement with religion." *Id.* at 613 (internal quotation and citation omitted). Though I am troubled by the necessity of having the Western Christian Church dictate the date of a State holiday each year, I would probably concur with the majority that this is not the sufficiently enduring entanglement required to invalidate the law. Further, while I am also concerned by the political divisiveness engendered by such a law, since Buddhists and others have sought to have their religious holidays similarly honored,

I also agree with the majority that this is not sufficient alone to overturn the holiday's establishment. I do not agree, however, that the timing of other religious groups' efforts to enact other state holidays is at all dispositive. In any event, since I would overturn the law on either the purpose or effects prongs, I will not venture to say whether the combination of the date and the political divisiveness would suffice to create political entanglement.

IV. GOOD FRIDAY, CHRISTMAS, AND THANKSGIVING

The district court made the additional effort to show that Good Friday is of a similarly secular nature as Christmas and Thanksgiving. *Cammack v. Waihee*, 674 F. Supp. 1524, 1539 (D. Hawaii 1987) ("this court concludes that Good Friday and Christmas stand on equal footing before the First Amendment"). It is true that the majority does not "accept the contention" that the observance of Good Friday has become secularized to the same extent as celebrations of Christmas and Thanksgiving. *Majority op.* at 10882 n.19. Yet it still notes that the average Hawaiian would view the inclusion of Good Friday as a holiday as no more of an establishment of religion than Christmas, *id.* at 10882, relies on Thanksgiving and Christmas as religious holidays in its context section, *id.* at 10878-79, and makes other analogies between Christmas and Good Friday as religious holidays. *Id.* at 10879. Because I strongly disagree with the theory that Good Friday may be compared in its religious and secular

makeup with Thanksgiving and Christmas, I add this section.

First and foremost, I do not think that the Supreme court agrees either. For example, "[a]s observed in this Nation, Christmas has a secular as well as a religious dimension." *County of Allegheny*, 109 S. Ct. at 3093 (footnote omitted). In fact, "[i]t has been suggested that the cultural aspect of Christmas in this country now exceeds the theological significance of the holiday." *Id.* at n.3. Justice O'Connor has noted, "[T]he celebration of Thanksgiving as a public holiday, despite its religious origins, is now generally understood as a celebration of patriotic values rather than particular religious beliefs." *Id.* at 3121 (O'Connor, J., concurring). Justice O'Connor continued, "Christmas is a public holiday that has both religious and secular aspects . . . " *Id.* at 3122 (O'Connor, J., concurring). *See also Lynch* (Christmas "has very strong secular components and traditions." [465 U.S.] at 692 (O'Connor, J., concurring)).[7]

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[7] *See also American Civil Liberties Union v. City of St. Charles*, 794 F.2d 265, 271 (7th Cir. 1986), where Judge Posner explained:

> Christmas is a national holiday, celebrated by nonobservant Christians and many nonChristians as well as by believing Christians. It owes its status, in part anyway, to the fact that most Christmas symbology either is unrelated to Christianity or is no longer associated with it in popular understanding. There is nothing distinctively Christian about reindeer, Santa Claus, gift-giving, eggnog, tinsel, toys, retail sales, roast goose, or the music (as distinct from the words) of Christmas carols.

Though the Court has not mentioned Good Friday, it has spoken on Easter: "The Easter holiday celebrated by Christians may be accompanied by certain 'secular aspects' . . . but it is nevertheless a religious holiday." *County to Allegheny*, 109 S. Ct. at 3122 (O'Connor, J., concurring). If Easter, the Easter Bunny notwithstanding, is still in essence a religious holiday, what does that say about Good Friday? Simply stated, good Friday has no secular symbols or accompanying secular celebration.

On one side of the holiday ledger we may place secular symbols: stockings, Santa Claus, elves, reindeer; and pilgrims, Native American maize, turkey, and cranberry; on the other side we place religious symbols: creches, menorahs, palms, and crucifixes. While Good Friday is associated with the religious symbol of Jesus Christ on the cross, it is, very much unlike Thanksgiving and Christmas, associated with no secular symbols at all. In fact, I think that we would insult observing Christians by characterizing Good Friday, a solemn day of worship and reflection on the death of Jesus Christ, as a day of convivial secular celebration. Easter, perhaps because it is a celebration of Jesus' resurrection, does have some secular components such as egg hunts and chocolate bunnies, and may, in this fashion, begin to approach Thanksgiving and Christmas. Good Friday, bereft of secular symbols or joyous festivity, simply does not belong in the same category. Indeed, while the death of Jesus Christ dominates Good Friday, for many, the reigning images of Christmas are the secular Ghosts of Christmas Past, Present, and Yet to Come.

Another telling example is that people of many religions or of no religion at all celebrate Thanksgiving and

even Christmas, but it would be difficult to find atheists, Jews, or Baha'is engaging in Good Friday commemorations. Christmas, indeed, may be seen as a whole season, which the man who is perhaps its greatest secularizer described as "a good time; a kind, forgiving, charitable, pleasant time; the only time I know of, in the long calendar of the year, when men and women seem by one consent to open their shut-up hearts freely, and to think of people below them as if they really were fellow-passengers to the grave, and not another race of creatures bound on other journeys." Dickens, *A Christmas Carol* 8-9 (Bantam ed. 1986). To say that such an ecumenical spirit pervades Good Friday is simply untenable. I must agree that there is no evidence that "the Christian holy day of Good Friday has become secularized in any degree during the course of its longtime observance by Christian sects." *Mandel v. Hodges*, 54 Cal. App. 3d 596, 612 (1976). Indeed, "the passage of time has not converted Good Friday into a secular holiday or freed it of its clearly religious origins." *Griswold Inn, Inc. v. State*, 441 A.2d 16, 21 (Conn. 1981) (holding state law banning liquor sales on Good Friday unconstitutional).

I find this equation of Good Friday with Christmas and Thanksgiving both distasteful to practicing Christians, who do not wish a serious day permeated by mirth and levity, and unsettling to adherents of other religions or nonreligious persons, who would not desire their secular celebrations of Thanksgiving and Christmas to be linked to a holiday they could not imagine honoring.

I, therefore, respectfully dissent.

APPENDIX B

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF HAWAII

NELL A. CAMMACK, et al., Plaintiffs, vs. JOHN WAIHEE, et al., Defendants.	CIVIL NO. 87-0260 (Filed Nov. 23, 1987)

ORDER DENYING PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT AND GRANTING DEFENDANTS' MOTION FOR SUMMARY JUDGMENT

I.

Background

In 1941, the legislature of the Territory of Hawaii enacted a statute which declared Good Friday, the Friday preceeding Easter, to be a legal holiday. This statute, which is now codified as Hawaii Rev. Stat. § 8-1, provides in pertinent part that Good Friday is "set apart and established as [a] state holiday[]."

In 1970, the Hawaii legislature enacted a statute which recognized that "joint decisionmaking [between public employees and their employers] is the modern way of administering government." Hawaii Rev. Stat. § 89-1. Accordingly, the legislature mandated that terms of public employment were to be determined through a process of collective bargaining. It is agreed by all parties hereto that the number and dates of paid leave days is a

mandatory subject of collective bargaining. All collective bargaining agreements currently in effect between public employees and their employers state, either expressly or through incorporation of Hawaii Rev. Stat. § 8-1, that Good Friday is a paid leave day. These collective bargaining agreements cover approximately 65% of Hawaii's public employees.

The plaintiffs in this action have filed a suit praying this court for a declaration that the Hawaii statute which sets aside Good Friday as a legal holiday is unconstitutional as violative of the United States and Hawaii Constitutions. The plaintiffs' argument is premised on the Establishment Clause of the United State's Constitution's First Amendment, and Article I, Section 4 of the Hawaii Constitution. The plaintiffs also ask this court to rule that the collective bargaining agreements which provide for a day of paid leave on Good Friday are violative of the subject constitutional provisions.

This case came before the court on the plaintiffs' and the defendants' cross-motions for summary judgment. This court, having considered the memoranda in support of and in opposition to the motions, the record on file, and the arguments of counsel finds and orders as follows.

II.

Standing

The defendants argue that the plaintiffs in this action lack standing to prosecute their suit. This court finds that the defendants' argument is not persuasive.

In *Flast v. Cohen*, 88 S.Ct. 1942 (1968), the plaintiffs brought suit to enjoin the allegedly unconstitutional expenditure of federal funds and argued that their standing to bring the suit derived from their status as taxpayers. The Court held that taxpayer standing was available to the plaintiffs, finding "no absolute bar in Article III to suits by federal taxpayers challenging allegedly unconstitutional federal taxing and spending programs." *Id.* at 1953. The Court went on to write in *Flast*, however, that mere taxpayer status is insufficient to establish standing to challenge an allegedly unconstitutional tax or expenditure. "[I]nquiries into the nexus between the status asserted by the litigant and the claim he presents are essential to assure that he is a proper and appropriate party to invoke federal judicial power." *Id.* Thus, even a taxpayer must present an Article III "case or controversy" before he or she may have a day in court.

The contours of an Article III "case or controversy" were defined by the Supreme Court in *Valley Forge Christian College v. Americans United for Separation of Church and State, Inc.*, 102 S.Ct. 752 (1982). In *Valley Forge*, the Court wrote that

> "at an irreducible minimum, Article III requires the party who invokes the court's authority to 'show that he personally has suffered some actual or threatened injury as a result of the putatively illegal conduct of the defendant,' and that the injury 'fairly can be traced to the challenged action' and 'is likely to be redressed by a favorable decision.'"

Id. at 758 (citations omitted). The *Valley Forge* opinion also firmly established that taxpayer standing is only appropriate in those cases in which legislative action pursuant to the taxing and spending powers is challenged. *Id.* at 762-64. Finally, it should be noted that while *Flast* and *Valley Forge* both dealt with challenges to an action taken by the federal legislature, subsequent opinions of the Supreme Court have extended taxpayer standing to parties who have challenged the actions of state legislatures. *See for example Grand Rapids School District of the City of Grand Rapids v. Ball,* 105 S.Ct. 3216, 3221 n. 5 (1985) (the Court has adjudicated cases involving Establishment Clause challenges to state expenditures).

Applying the foregoing precepts to the instant case leads this court to the conclusion that the plaintiffs herein have adequately established their entitlement to a day in court. As in *Flast,* the plaintiffs in this case have alleged that the Hawaii legislature expends substantial sums of money each year to advance religion. Specifically, the plaintiffs have provided this court with evidence supporting a claim that the personnel costs which are incurred each year in order to give those public employees who are covered by a collective bargaining agreement a day of paid leave on Good Friday amount to $3,400,000.00.

In *Lynch v. Donnelly,* 104 S.Ct. 1355 (1984), the Supreme Court adjudicated a case, apparently premised on taxpayer standing, in which the plaintiffs challenged the constitutionality of a city's decision to include a creche in an annual Christmas display. The creche, whose inclusion in the display gave rise to the alleged injuries in *Lynch,* was acquired by the city for $1,365.00. The annual

expenses for erecting and dismantling the creche amounted to approximately $20.00 each year. Obviously, the state's annual expenditure in the instant case, amounting to millions of taxpayer dollars, far outshadows the apparent challenged expenditure, and concomitant injury, which the *Lynch* court found to give rise to a justiciable Establishment Clause challenge. This court further notes that the taxpayer standing in the *Lynch* case may have derived from the federal government's expenditure of millions of dollars necessitated by granting federal employees a paid holiday on Christmas. *Id.* at 1360-61. Thus, if the Supreme Court found no standing problem that would bar adjudication of the dispute in *Lynch*, it is unlikely that it would find a standing problem in the instant case.

This court also finds that a favorable ruling in this case would remedy the plaintiffs' injuries. As noted above, the plaintiffs argue that they are injured because Hawaii Rev. Stat. § 8-1 impermissibly advances religion, and that therefore, the monies which are expended from the public fisc to effect the statute's mandate is an unconstitutional expenditure. If this court strikes down Hawaii Rev. Stat. § 8-1 as constitutionally flawed, the alleged entanglement between the State of Hawaii and religion would be terminated. Similarly, if this court finds that the subject collective bargaining agreements contain a fatal constitutional defect, the plaintiffs' alleged injuries would be remedied; either the collective bargaining agreements would be voided as contrary to public policy, or the collective bargaining agreements would have to be revised in the next round of negotiations to reflect the

unconstitutionality of including Good Friday as a paid leave day.

For the foregoing reasons, this court finds that the plaintiffs have standing to raise their constitutional challenge in federal court.

III.

Abstention

The defendants in this case have argued that this court should abstain. The defendants maintain that the state courts of Hawaii should rule upon the merits of the instant controversy before this court becomes embroiled in "serious constitutional questions." In essence, this argument is premised on the claims that Hawaii courts could resolve the instant dispute through the application of Hawaii law and that Hawaii courts are amenable to the certification of important questions of Hawaii law by the federal court. The defendants' argument, then, is that the Supreme Court's opinion in *Railroad Commission of Texas v. Pullman Co.*, 61 S.Ct. 643 (1941), calls for abstention in the instant case.

"Abstention from the exercise of federal jurisdiction is the exception, not the rule . . . 'Abdication of the obligation to decide cases can be justified under this doctrine only in the exceptional circumstances where the order to the parties to repair to the state court would clearly serve an important countervailing interest.' " *Colorado River Water Conservation District v. U.S.*, 96 S.Ct. 1236, 1244 (1976), *citing County of Allegheny v. Frank Mashuda*

Co., 79 S.Ct. 1060 (1959). The Supreme Court has succinctly defined the legal scenario in which *Pullman* abstention counsels a federal court to defer to a state court adjudication of a dispute. *Pullman* abstention is called for "in cases presenting a federal constitutional issue which might be mooted or presented in a different posture by a state court determination of pertinent state law." *Colorado River* at 1244. The Ninth Circuit has explained the dual rationale of *Pullman* abstention: (1) "to permit state court interpretations of uncertain questions of state law" and (2) "to avoid premature adjudication of federal constitutional questions." *Carreras v. City of Anaheim*, 768 F.2d 1039 (9th Cir. 1985).

This court first notes that it has undertaken its own review of those provisions of the Hawaii constitution which are applicable to the resolution of the instant case. This court has focused its inquiry on Article I, Section 4 of the Hawaii Constitution which contains a provision which is virtually identical to the First Amendment of the United States Constitution. The First Amendment provides, in pertinent part, that "Congress shall make no law respecting an establishment of religion." The Hawaii Constitution provides, in pertinent part, that "[n]o law shall be enacted respecting an establishment of religion." This court has found no case law which leads to a conclusion that the Hawaii courts interpret the Hawaii Constitution differently than the federal courts interpret the United States Constitution in the limited area of Establishment Clause jurisprudence. There is no indication that Hawaii courts, if afforded the opportunity, would accord any lesser or greater protection to its citizens under its own Constitution than they are already afforded under

the Constitution of the United States. Moreover, this court takes judicial notice of the fact that no litigation challenging the constitutionality of a Good Friday holiday is presently pending before the Hawaii courts. Thus *Pullman* abstention is inappropriate in the instant case; application of federal and Hawaii law is likely to yield the same result in the adjudication of the issues presented in this case.

Another argument proffered in support of the defendants' motion to abstain is that Hawaii Rev. Stat. § 8-1 has been preempted by the collective bargaining agreements which are in effect between public employees and their employers. This argument is premised on Hawaii Rev. Stat. § 89-19 which provides, in pertinent part, that Hawaii statutes pertaining to collective bargaining "shall take precedence over all conflicting statutes concerning this subject matter and shall preempt all contrary . . . legislation . . . adopted by the State." This court finds that Hawaii Rev. Stat. § 8-1, which establishes Good Friday as a legal holiday, is in no way conflicting with Hawaii's collective bargaining statutes. Chapter 89 of the Hawaii Revised Statutes, wherein are found the collective bargaining statues, does not mandate that Good Friday be included in all collective bargaining agreements as a paid leave day. The inclusion of this holiday into the collective bargaining agreements is a matter of contract and not a matter of legislation. Furthermore, the argument that the inclusion of a Good Friday holiday into the collective bargaining agreements of approximately 65% of Hawaii's public employees suspends the effect of a validly enacted statute of the state strains credulity. Accordingly, Hawaii Rev. Stat. § 8-1 is not preempted.

For the foregoing reasons, this court will decline to abstain from adjudication of this case.

IV.

Constitutionality of Hawaii Rev. Stat. § 8-1

Having resolved the foregoing issues relating to the suitability of this forum for the presentation of the plaintiffs' challenge in favor of plaintiffs, this court proceeds to the substance of the motions. The plaintiffs and defendants have cross-moved for summary judgment on the issue of whether Hawaii Rev. Stat. § 8-1 violates the Establishment Clause of the United States Constitution and its counterpart in the Hawaii Constitution.

Rule 56 of the Federal Rules of Civil Procedure provides that summary judgment "shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, in any, show that there is no genuine issue as to any material act and that the moving party is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(c). "A 'material' fact is one that is relevant to an element of a claim or defense and whose existence might affect the outcome of the suit." *T.W. Electrical Service, Inc. v. Pacific Electrical Contractors Assoc.*, 809 F.2d 626, 630 (1987). If the moving party meets his burden under Fed. R. Civ. P. 56(c), the non-moving party must set forth, by affidavit or as otherwise provided in Rule 56 "specific facts showing that there is a genuine issue for trial." Fed. R. Civ. P. 56(e).

In *Lynch v. Donnelly*, 104 S.Ct. 1355, 1362 (1984), the Supreme Court reiterated its unwillingness "to be confined to any single test or criterion in this sensitive area"

of First Amendment challenges to legislation. Nevertheless, the *Lynch* opinion indicates that the Supreme Court still usually adheres to the three prong test enunciated in *Lemon v. Kurtzman*, 91 S.Ct. 2105 (1971), in analyzing such challenges. The essential holding of *Lemon* has become a refrain in virtually all federal cases which challenge lesgislative [sic] action which is allegedly violative of the First Amendment.

> "Every analysis in this area must begin with consideration of the cumulative criteria developed by the Court over many years. Three such tests may be gleaned from our cases. First, the statute must have a secular legislative purpose; second, its principal or primary effect must be one that neither advances nor inhibits religion; finally the statute must not foster 'an excessive government entanglement with religion.' "

Id. at 2111 (citations omitted).

While the *Lemon* opinion set forth the analysis which is to be used in the resolution of Establishment Clause challenges to legislative action, the opinion also cautioned that a complete separation between the state and religious institutions was not contemplated by the drafters of the First Amendment. Thus, the Court wrote that "[o]ur prior holdings do not call for total separation between church and state; total separation is not possible in an absolute sense. Some relationship between government and religious organizations is inevitable." *Id.* at 2112. Accordingly, federal courts have been cautioned not to be overly "reflexive" in resolving Establishment Clause challenges. "In each case, the inquiry calls for line-drawing; no fixed, *per se* rule can be framed . . . The Clause

erects a 'blurred, indistinct, and variable barrier depending on all the circumstances of a particular relationship.' " *Lynch v. Donnelly*, 104 S.Ct. at 1362, *citing Lemon*, 91 S.Ct. at 2112. Although the Supreme Court decision have sometimes stated that the Establishment Clause erects a "wall" between church and state,

> "the metaphor itself is not a wholly accurate description of the practical aspects of the relationship that in fact exists between church and state. No significant segment of our society and no institution within it can exist in a vacuum or in total or absolute isolation from all the other parts, much less from government."

Lynch, 104 S.Ct. at 1359.

The indistinct and variable barrier between religion and the state has a history which is as old as the history of the First Amendment itself. Various legislative acts of the First Session of the First Congress in 1789 give substance to the Supreme Court's observation that "[i]t has never been thought either possible or desirable to enforce a regime of total separation . . . " *Committee for Public Education & Religious Liberty v. Nyquist*, 93 S.Ct. 2955, 2958 (1973). Indeed, on the day after the First Amendment was proposed, "Congress urged President Washington to proclaim 'a day of public thanksgiving and prayer to be observed by acknowledging with grateful hearts the many and signal favours of the Almighty God.' " *Lynch*, 104 S.Ct. at 1360 n. 2, *citing* A. Stokes and L. Pfeffer, *Church and State in the United States* 87 (rev. 1st ed. 1964). President Washington acceded to the Congress's request and proclaimed a "day of thanksgiving to 'offer our prayers and supplications to the Great Lord and Ruler of

Nations . . . " Every President of the United States, with two exceptions, has issued similar proclamations. For example, President Roosevelt's proclamation of 1944 suggested "a nationwide reading of the Holy Scriptures during the period from Thanksgiving Day to Christmas." *Id.* Furthermore, "[i]n the very week that Congress approved the Establishment Clause as part of the Bill of Rights for submission to the states, it enacted legislation providing for paid Chaplains for the House and Senate." *Lynch*, 104 S.Ct. at 1359.

Accordingly, the inevitability and, indeed, the desirability of the intermingling of this nation's political and spiritual affairs has been long recognized. As the Supreme Court held in *Zorach v. Clauson*, 72 S.Ct. 679, 684 (1952), "[w]e are a religious people whose institutions presuppose a Supreme Being." "[R]eligion has been closely identified with our history and government . . . The fact that the Founding Fathers believed devotedly that there was a God and that the inalienable rights of man were rooted in Him is clearly evidenced in their writings, from the Mayflower Compact to the Constitution itself." *School District of Abington Township v. Schempp*, 83 S.Ct. 1560, 1566 (1963). No judicial semantics can alter the fact that the drafters of the First Amendment felt constrained to acknowledge the religious origins of the nascent country during the First Congress and now "[i]t is far too late in the day to impose a crabbed reading of the [Establishment] Clause on the country." *Lynch*, 104 S.Ct. at 1366. Moreover, the Supreme Court has counseled that special consideration should be given to the First Congress's interpretation of the Establishment Clause in First Amendment jurisprudence:

> "[t]he interpretation of the Establishment Clause by Congress in 1789 takes on special significance in light of the Court's emphasis that the First Congress 'was a Congress whose constitutional decision have always been regarded, as they should be regarded, as of the greatest weight in the interpretation of that fundamental instrument.' "

Id. at 1359-60, *citing Myers v. U.S.*, 47 S.Ct. 21, 45 (1926).

Although the Supreme Court has stated that Establishment Clause cases must be decided on a somewhat *ad hoc* basis, the Court has not failed to assist the lower federal courts in making these *ad hoc* determinations by spelling out the various prongs of the *Lemon* test. While the *Lemon* opinion gave lower federal courts a skeletal framework with which to analyze an Establishment Clause case, subsequent opinions of the Supreme Court have fleshed out the framework and provided guidance to lower courts in their application of the three-pronged analysis. Thus, it is incumbent upon this court to review recent Establishment Clause cases decided by the Supreme Court before applying *Lemon* in the instant case.

1. The Purpose Prong.

The *Lemon* opinion holds that "the statute must have a secular legislative purpose." 91 S.Ct. at 2111. "In applying the purpose test, it is appropriate to ask 'whether the government's actual purpose is to endorse or disapprove of religion.' " *Wallace v. Jaffree*, 105 S.Ct. 2479, 2490 (1985). In recent cases, the Supreme Court has made it clear that the legislature's purpose in enacting a statute need not be wholly secular to pass muster under the Establishment

Clause. In *Wallace*, the Supreme Court held that "a statute that is motivated in part by a religious purpose may satisfy the first [prong of the *Lemon* test, but] the First Amendment requires that a statute must be invalidated if it is entirely motivated by a purpose to advance religion." *Id.* Similarly, in *Lynch*, the Supreme Court held that *Lemon* requires that a statute have "*a*" secular purpose to satisfy the purpose prong; the *Lynch* opinion firmly rejects the notion that the purpose of a statute must be "exclusively secular" to be upheld. *Id.*, 104 S.Ct. at 1363 n. 6. Thus, it is clear that a statute which is motivated by both sectarian and secular purposes is not offensive to the Establishment Clause.

The Supreme Court has also given lower federal courts guidance on how to determine the legislative purpose behind a statute in an Establishment Clause case.

> "The plain meaning of the statute's words, enlightened by their context and the contemporaneous legislative history, can control the determination of legislative purpose . . . Moreover, in determining the legislative purpose of a statute, the court has also considered the historical context of the statute and the specific sequence of events leading to passage of the statute."

Edwards v. Aguillard, 107 S.Ct. 2573, 2583 (1987).

Supreme Court opinions counsel that courts should be deferential to a state's articulation of a secular purpose, if the court feels that the statement of purpose is sincere and not a sham. *Id.* at 2579. At the same time, however, the Supreme Court has stated that "postenactment elucidation of the meaning of a statute [is] of little

relevance in determining the intent of the legislative contemporaneous to the passage of the statute." *Id.* at 2584 n. 19. Thus, a court should *not* give deference to arguments which are made during litigation regarding the purpose behind a statute, unless those arguments are supported by legislative statements contemporaneous with the enactment of the statute.

2. The Effect Prong.

The *Lemon* opinion states that a statute's "principal or primary effect must be one that neither advances nor inhibits religion." 91 S.Ct. at 2111. To a certain extent, a court's inquiries into the purpose and effect prongs may result in overlap, especially if the legislature's intended purpose has been successfully furthered by the challenged statute. Nevertheless, the Supreme Court has cautioned that the two prongs are conceptually distinct. "The purpose prong of the *Lemon* test asks whether government's actual purpose is to endorse or approve of religion. The effect prong asks whether, irrespective of government's actual purpose, the practice under review in fact conveys a message of endorsement or disapproval." *Wallace*. 105 S.Ct. at 2490 n. 42, *citing Lynch*, 104 S.Ct. at 1368 (O'Connor, concurring).

In *Grand Rapids School District v. Ball*, 105 S.Ct. 3216 (1985), the Supreme Court set out in general terms the significance of the effects prong of the *Lemon* test.

> "[A]n important concern of the effects test is whether the symbolic union of church and state effected by the challenged governmental action

> is sufficiently likely to be perceived by adherents of the controlling denominations as an endorsement, and by the non-adherents as a disapproval. of their individual religious choices . . . The question in each case must be whether the effect of the proferred aid is 'direct and substantial' or 'indirect and incidental.' "

Id. at 3226, 3229.

The above quotation from *Ball* makes it clear that, as with the purpose prong, a statute may have sectarian effects and still be constitutionally permissible under *Lemon* analysis. First, the Supreme Court has distinguished between statutes which directly advance religion and statutes which allow religious institutions to advance religion, and therefore confer an "incidental" benefit upon religion. "A law is not unconstitutional simply because it *allows* churches to advance religion, which is their purpose. For a law to have forbidden effects under *Lemon*, it must be fair to say that the *government itself* has advanced religion through its activities and influence." *Corporation of the Presiding Bishop of the Church of Jesus Christ of Latter-Day Saints v. Amos*, 107 S.Ct. 2862, 2869 (1987) (emphasis in the original).

Second, even if a statute confers a governmental benefit on some particular sect, the statute may still be upheld if its primary effect is secular in nature. "The Court has made it abundantly clear . . . that 'not every law that confers an indirect, remote, or incidental benefit upon [religion] is, for that reason alone constitutionally invalid.' " *Lynch*, 104 S.Ct. at 1364, *citing Nyquist*, 93 S.Ct. at 2965. If, for example, a statute's "effect merely happens

to coincide or harmonize with the tenets of some-. . . religions," the statute does not offend the First Amendment. *Lynch,* 104 S.Ct. at 1364, *citing McGowan v. Maryland,* 81 S.Ct. 1101, 1113 (1961).

The Supreme Court's opinion in *McGowan* is particularly relevant to this court's application of the effects prong of the *Lemon* test to the facts of the instant case. In *McGowan,* the Court scrutinized the constitutionality of Sunday Closing Laws and upheld those laws, writing that

> "[t]hroughout this century and longer, both the federal and state governments have oriented their activities very largely toward improvement of the health, safety, recreation, and general well-being of our citizens. Numerous laws affecting public health, safety factors in industry, laws affecting hours and conditions of labor of women and children, week-end diversion at parks and beaches, and cultural activities of various kinds, now point the way toward the good life for all. Sunday Closing Laws, like those before us, have become part and parcel of this great governmental concern wholly apart from their original purposes or connotations. The present purpose and effect of most of them is to provide a uniform day of rest for all citizens; the fact that this day is Sunday, a day of particular significance for the dominant Christian sects, does not bar the State from achieving its secular goals. To say that the States cannot prescribe Sunday as a day of rest for these purposes solely because centuries ago such laws had their genesis in religion would give a constitutional interpretation of hostility to the public welfare rather than one of mere separation of church and state.

81 S.Ct. at 1115.

Thus, in analyzing the constitutionality of a statute under the *Lemon* test, a court may not confine itself to an examination of those of the statute's effects which might advance religion. Rather, it is incumbent upon the court to make a complete review of *all* the effects of the statute. If a statute's primary effect is secular, the statute may be upheld even though the statute may also have sectarian effects. It is the mission of religious institutions to advance religion, and if an otherwise valid statute allows religious institutions to more successfully embark upon this mission, this does not derogate from the constitutionality of the statute.

3. The Entanglement Prong.

Establishment Clause jurisprudence is perhaps most sparse with respect to the significance of the entanglement prong of the *Lemon* test which counsels against "an excessive government entanglement with religion." *Lemon*, 91 S.Ct. at 2111. The Supreme Court in *Lynch* characterized entanglement as "a question of kind and degree." 104 S.Ct. at 1365.

The First Amendment proscribes two basic types of government entanglement. First, courts should be cautious to ensure that there is no significant financial subsidy of religion by government. The nature of the financial entanglement is of critical importance in application of the *Lemon* test. In *Lynch*, the Supreme Court held that in the absence of "a *direct* subsidy to church-sponsored schools or colleges, or other religious institutions," a finding of excessive government entanglement is not warranted. 104 S.Ct. at 1365 (emphasis added). Second,

courts should be wary of excessive administrative entanglement. Thus, the *Lynch* opinion echoes the *Lemon* and holds that "comprehensive, discriminating, and continuing state surveillance" of the activities of religious institutions is the type of "excessive entanglement" proscribed by the First Amendment. 104 S.Ct. at 1365, *citing Lemon*, 91 S.Ct. at 2114-15.

4. Application of the Lemon Test

Taking into consideration the foregoing outlines of the *Lemon* test, as they have been developed by *Lynch* and other opinions of the Supreme Court, this court is of the opinion that Hawaii Rev. Stat. § 8-1 which establishes Good Friday as a legal holiday in Hawaii *does not* violate the First Amendment of the United States Constitution or Article I, Section 4 of the Hawaii Constitution.

The plaintiffs argue that the legislative history of the statute which establishes Good Friday as a legal holiday leads to the conclusion that the statute was enacted for sectarian purposes. Accordingly, argue the plaintiffs, the statute is constitutionally defective. To prevail on their motion for summary judgment on this theory, the plaintiffs must prove that "there [is] no question that the statute . . . was motivated wholly by religious considerations." *Lynch*, 104 S.Ct. at 1362. The plaintiffs have failed to carry this burden.

The plaintiffs' argument is based upon a reading of the House Standing Committee Report which accompanied a proposed bill that would have enacted a statute establishing Good Friday as a legal holiday in 1939. The pertinent portion of the report reads as follows:

> "There are now ten legal holidays in the Territory, including Thanksgiving, plus primary and general election days. Public sentiment is divided on the advisability of creating Good Friday as a legal holiday. Some feel that we already have too many holidays to the detriment of both private and public business. On the other hand, others feel equally strongly that Good Friday being in theory at least a day of solemn religious observance by the members of the various churches and religious denominations should be given legal sanction. More and more churches are not conducting the three-hour service on that day and many business houses are allowing their employees to take time off for this purpose. If the legislature should feel that we should have more legal holidays than we now have, it would seem that in view of the religious significance of Good Friday observance of this day would have as much justification as Thanksgiving or Christmas."

Haw. H. Stand. Comm. Rep. No. 254-39, *reprinted in* 1939 Haw. H. J. 890. Although the 1939 bill was not passed, the legislative history of that bill is relevant to the history of the 1941 bill which did enact Good Friday as a legal holiday. *See Edwards v. Aguillard*, 107 S.Ct. at 2583 (historical context of the statute and the specific sequence of events leading to the passage of the statute are relevant in determining purpose under a *Lemon* analysis).

A fair reading of the committee report which accompanied the 1939 bill leads to the conclusion that the primary purpose behind the bill was to ensure that legal holidays in the Territory of Hawaii fell with greater frequency. Indeed, perhaps the most importance sentence of

the pertinent paragraph, that sentence which recommends the establishment of Good Friday as a holiday, begins with the phrase "[i]f the legislature should feel that we should have more legal holidays than we now have. . . . " The import of the phrase could hardly be clearer: legislative debate on the bill enacting Good Friday as a legal holiday was prompted by the legislature's view that the Territory needed "more" holidays. This conclusion is further buttressed by an examination of a schedule of Hawaii's legal holidays as they existed before the enactment of the statute which established Good Friday as a legal holiday:

Month	# of Holidays
January	1
February	1
March	0
April	0
May	1
June	1
July	1
August	0
September	2
October	0
November	1
December	1

Revised Laws of Hawaii § 1-21 (1935). As indicated above, there was a three month period which fell between Washington's Birthday in February and Memorial Day at the end of May during which there were no legal holidays. The establishment of a Good Friday holiday provided for an additional legal holiday during the calendar year's longest "holiday-free" period.

The Senate Standing Committee report which accompanied the 1941 bill which eventually established Good Friday as a legal holiday sheds further light on the legislature's primary purpose in enacting the antecedent of Hawaii Rev. Stat. § 8-1 and bears out the conclusion that the purpose was secular in character. The 1941 bill proposed that both Lincoln's Birthday and Good Friday be designated as legal holidays. The report which accompanied the bill states that

> "[y]our committee feels that Good Friday should be set aside as a legal holiday but feels that, inasmuch as Washington's Birthday is a legal holiday and falls within the the [sic] short month of February, to have another holiday within that month would inadvisable."

Haw. Sen. Stand. Comm. Rep. No. 296-41, *reprinted in* 1941 Haw. Sen. J. 710. This language makes the legislature's primary concern regarding the number and frequency of legal holidays apparent. The report on the bill noted that there was not a need for an additional legal holiday in February because of the temporal proximity of Washington's Birthday which was already a legal holiday; the report, however, did advocate the establishment of Good Friday as a legal holiday, presumably because no legal holidays fell during early to mid-Spring.

This case is clearly distinguishable from cases such as *Mandel v. Hodges*, 127 Cal.Rptr. 244 (Cal.App. 1975). In *Mandel*, a California appellate panel scrutinized the constitutionality of an annual executive proclamation declaring a three hour period on the afternoon of Good Friday to be a paid holiday for state employees. The court noted that a personnel manual distributed to state employees

declared that "inasmuch as state office [sic] are closed from 12:00 to 3:00 p.m. on Good Friday, employees are given these hours off for worship." *Id.* at 254. Based upon such an express avowal of religious motivation, the court held that the Good Friday holiday "wholly lacks any 'secular purpose.' " Accordingly, the court found that the holiday violated the First Amendment of the United States Constitution. In the instant case, the expressed purpose of the statute is *not* religious; rather, the purpose of the Good Friday holiday, as noted above, is to give Hawaii's workers a day off as a rest from their daily affairs. Furthermore, the secular nature of Hawaii's Good Friday holiday is evidenced by the fact that the *entire* day, rather than a three hour period which corresponds in length to the traditional religious service, is a legal holiday.

Thus, there is no doubt that the legislature had "a clearly secular purpose" in mind when it enacted the antecedent of Hawaii Rev. Stat. § 8-1. The fact that the legislature was able to coordinate this secular purpose with a religious purpose is not fatal to the statute. Even if this court assumes that the legislature did enact the Good Friday statute with sectarian purposes in mind, to allow the religious to worship on Good Friday and to allow churches to call the faithful to prayer, the existence of these sectarian purposes would not constitutionally flaw the statute. As indicated above in this order, the Supreme Court only requires that a statute have "a" clearly secular purpose to meet the requirements of the *Lemon* test. *Lynch*, 104 S.Ct. at 1363 n. 6.

Therefore, an examination of the 1939 report leads this court to conclude that the Good Friday holiday was

primarily proposed to increase the frequency of legal holidays. It is also noteworthy to point out, as does the State in this case, that the legislative report seems to acknowledge that Good Friday is not an entirely religious day. The 1939 report characterizes Good Friday as "in theory at least a day of solemn religious observances," apparently reflecting the legislature's sentiment that Good Friday had lost much of its religious nature and had become a holiday similar in nature to Thanksgiving and Christmas which have been secularized to some extent over the centuries. Indeed, this court is also of the opinion that Good Friday has attained a secular character; for the majority of Americans Good Friday has become more an integral part of a traditional three day secular celebration of Spring which begins on Good Friday and continues through Easter Sunday than a solemn observance of Jesus Christ's crucifixion.

This court concludes that the secular purpose behind the establishment of the Good Friday is manifest. The legislature does not offend the First Amendment by enacting a statute intended to ensure that the people of Hawaii have an adequate number of leave days. This court further concludes that any ancillary sectarian purpose which the legislature may have had in establishing Good Friday as a holiday is not fatal to the Hawaii Rev. Stat. § 8-1, since "a clearly secular purpose" for the statute exists and since Good Friday, like Christmas, has become secularized to some extent over the centuries.

An examination of the effects of Hawaii Rev. Stat. § 8-1 leads this court to the conclusion that the legislature's intended purpose in declaring Good Friday to be a legal holiday has been fulfilled. While the plaintiffs argue

that the effect of the Good Friday statute is to give Christian sects the imprimatur of State approval, an analysis of the effects of the statue compels this court to find that the secular effects of the statute significantly predominate over the sectarian effects of the statute.

The defendants have submitted the affidavits of Robert Robinson and Lex Brodie in support of their motion for summary judgment. Mr. Robinson is the President and the Chief Executive Officer of the Chamber of Commerce of Hawaii and Mr. Brodie is the President and Owner of National Tire of Hawaii, Ltd. The affidavits support the finding that Good Friday has become a traditional shopping day in Hawaii. Both affidavits state that sales volumes increase on Good Friday, and that the increase in sales volume is almost certainly attributable to the fact that the day is a paid leave day for many workers in the state. The defendants have also submitted a letter from Hiram Kamaka, Director of the City and County of Honolulu's Department of Parks and Recreation. This letter establishes the fact that applications for camping permits on the island of Oahu more than double on the long weekend which includes Good Friday. This letter leads to the inference that Hawaii's population is better poised to take advantage of the state's unique recreational opportunities because of the enactment of the Good Friday statute which creates a "three-day weekend" for many Hawaiians. The salutary effect of increasing the quality of life of workers through the advancement of recreational opportunities was expressly sanctioned by the Supreme Court in *McGowan, supra,* even though the Sunday Closing Laws which were under scrutiny in that case had an incidental religious effect.

Since *Lynch*, it has been well settled that statutes which confer an "indirect, remote, or incidental" benefit upon religion are not offensive to the First Amendment. Furthermore, the opinion of the Supreme Court in *Amos*, quoted above, is particularly apt here and merits reiteration: "[a] law is not unconstitutional simply because it *allows* churches to advance religion, which is their purpose. For a law to have forbidden effects under *Lemon*, it must be fair to say that the *government itself* has advanced religion through its activities and influence." 107 S.Ct. at 2869. Supreme Court opinions further hold that government's secular celebration of traditional religious holidays is not a constitutionally impermissible "effect." "Government celebration of [Christmas], which is extremely common, generally is not understood to endorse the religious content of the holiday, just as government celebration of Thanksgiving is not so understood." *Lynch*, 104 S.Ct. at 1369 (O'Connor, concurring).

In the instant case, there is simply no evidence that the enactment of Hawaii Rev. Stat. § 8-1 has advanced Christianity. The affidavits of the plaintiffs which were attached to the memorandum in support of their motion do not indicate that the inconveniences which have been occasioned by the Good Friday statute are any different in degree or kind than those inconveniences which accompany every legal holiday in the state.

The deposition testimony of the various plaintiffs also supports this court's conclusion that the effects of the Good Friday holiday are no different from the effects of any legal holiday of a more patently secular character. Plaintiff Root testified that although various University of Hawaii libraries were closed on Good Friday and that

although he did not have secretarial services on that day, he was able to attend to his research in his University of Hawaii laboratory. (Root deposition, p. 49.) Plaintiff Root further testified he does not feel that the establishment of the Good Friday holiday discriminates against his adherence to his own religious beliefs. (Root deposition, p. 55.) Plaintiff Cammack testified that the Good Friday has not prevented her from fulfilling her professional obligations. (Cammack deposition, p. 30.) Plaintiff Cammack takes advantage of the Good Friday holiday by visiting with family, shopping, travelling, and resting. (Cammack deposition, pp. 47, 50, 68-69.) Plaintiff Wallace testified that on Good Friday she was able to study in the classrooms at the University of Hawaii, where she was a law student, even though the day is a legal holiday. (Wallace deposition, pp. 39-40.) She also testified that she will have access to the Hawaii Supreme Court's law library on Good Friday when she will serve as a law clerk to a justice on that court. (Wallace deposition, p. 23.) Apparently, the only inconveniences suffered by plaintiff Wallace on Good Friday resulted from the curtailment of various services at public libraries and the reduced holiday schedule of the public bus lines. (Wallace deposition, p. 26.) the reduction in public library services and the closure of a public office building are the only tangible injuries to which Plaintiff Stapleton testified. (Stapleton deposition, pp. 25, 32.) Significantly, plaintiffs Root, Cammack, and Wallace testified that they did not notice any display of religious symbology which they can attribute to the establishment of a Good Friday holiday. (Root deposition, pp. 56, 91; Cammack deposition, pp. 40-42; Wallace deposition, pp. 40-50.) Public employers do not

coerce their employees into attending church on Good Friday and the day is a paid leave day for all employees, regardless of their individual religious choices. The fact that the enactment of the statute may facilitate larger congregations at Good Friday services does not enter into this court's calculus; as noted above, churches are charged with a special mission and if legislative action has the incidental benefit of allowing them to pursue that mission more successfully, such an incidental benefit is in no way offensive to the First Amendment.

The important point here is that days which are religiously significant for one sect may mean different things to different people. A day which is a "holy day" for a Christian may be a "holiday" for a Jew, or a Buddhist, or a Baha'i, or an atheist. While Jews, Buddhists, Baha'is, and atheists may celebrate the advent of Spring on the long weekend which begins with Good Friday by hunting for gaily colored eggs in their gardens, delivering baskets of candies and flowers to family and friends, and other secular activities, Christians may commemorate the death and resurrection of Jesus Christ. Each person is free to emphasize those aspects of the holiday, the secular or the sectarian, which he or she chooses to emphasize, just as each individual is free to focus on the secular or the sectarian facets of our traditional Thanksgiving and Christmas holidays. In *Lynch*, the Court found that federal employees are released from their duties on Thanksgiving and on Christmas, to spend those days as they so choose. *Id.* at 1360-61. Similarly, this court finds that Hawaii's employees may spend Good Friday as they so choose.

Thus, this court acknowledges that the establishment of Good Friday as a legal holiday may have effects which coincide or harmonize with the religious tenets of Christianity, and which incidentally benefit Christians and their churches. Supreme Court "precedents plainly contemplate that on occasion some advancement of religion will result from governmental action." *Lynch*, 104 S.Ct. at 1364. *Lynch* teaches that such effects are not proscribed by the First Amendment when the primary effect, and, indeed, the intended effect, of the statute is secular, 104 S.Ct. at 1364. It would stand the First Amendment on its head to hold that any secularly motivated statute, which successfully achieved its secular purpose, must be stricken as violative of the First Amendment if the statute also allows a segment of the population to comply with their religious obligations. As the *Lynch* opinion states, the First Amendment "affirmatively mandates accommodation, not merely tolerance, of all religions, and forbids hostility towards any." *Lynch*, 104 S.Ct. at 1359.

This court concludes that the primary effect of the Good Friday statute is secular in nature. Specifically, the court finds that the citizens of Hawaii are afforded a needed day off from work on that day; whether the people of Hawaii choose to spend the day at the beach or in their churches is an individual choice which is in no way influenced by the state. Since the primary effect of the holiday is secular, Hawaii Rev. Stat. § 8-1 passes muster under the effect prong of the *Lemon* test.

The plaintiffs' argument that the enactment of a Good Friday holiday has resulted in excessive government entanglement with religion is two-pronged. First, the plaintiffs make an argument raising the spectre of

administrative entanglement; they argue that the enactment of Hawaii Rev. Stat. § 8-1 has been politically divisive because religious sects other than the Christian sects have attempted, and failed, to have significant holy days in their calendar declared legal holidays by the state legislature. For example, the plaintiffs refer this court to the Hawaii legislature's refusal to declare Buddha Day and Baha'i New Year's Day as legal holidays. This court is unpersuaded by this argument of the plaintiffs. While the Hawaii legislature has refused to declare these days as public holidays, a Hawaii statute states that April 8 of each year "shall be known and designated as 'Buddha Day' " and that March 21 "shall be known as Baha'i New Year's Day." Hawaii Rev. Stat. § 8-4. More importantly, any evidence that Buddhists or Baha'is have been motivated to seek holiday status for their respective holy days by the existence of the Good Friday holiday is conspiculously [sic] absent from the plaintiffs' argument. The attempts by these religious sects to have their respective holy days established as legal holidays were made approximately 30 years after the antecedent of Hawaii Rev. Stat. § 8-1 was enacted. Whether the existence of Christmas as a legal holiday in Hawaii, the existence of Good Friday as a legal holiday, or some other motivation unrelated to the current roster of holidays was the initial impetus behind the lobbying efforts to have religious days declared as legal holidays is simply unclear. In the absence of a causal link between the efforts of some religious sects to have certain days declared legal holidays and the establishment of Good Friday as a legal holiday in Hawaii, and in the absence of any evidence of acrimony between the religious sects of this state, this

court cannot conclude that Hawaii Rev. Stat. § 8-1 has been divisive. Furthermore just as in *Lynch*, "[t]his case does not involve a direct subsidy to . . . religious institutions, and hence no inquiry into political divisiveness is even called for." 104 S.Ct. at 1365.

Second, the plaintiffs argue that Hawaii Rev. Stat. § 8-1 results in entanglement because the date of Good Friday is determined each year by reference to an "ecclesiastical" calendar. (At the oral argument on these motions, the plaintiffs' attorney conceded that this entanglement argument is a "weak" argument.) First, this court notes that while Good Friday may be on an "ecclesiastical" calendar, its date in fact is determined by reference to a lunar calendar which exists independently of any religious scripture. Second, the intrusion of religion into government caused by the designation of a "floating" holiday's date by reference to a lunar calendar, if any, is *de minimis* and certainly not the "comprehensive" and "continuing" entanglement which the First Amendment was designed to prevent. *Lynch*, 104 S.Ct. at 1365. This court is not persuaded by, and is in no way bound by, the opinion in *Griswold Inn, Inc. v. Connecticut*, 441 A.2d 16, 22 (1981), in which the court found without any explanation that the reference to an "ecclesiastical" calendar contributed to a finding of entanglement of government with religion. Thus, this court concludes that the Good Friday holiday has not led to excessive entanglement between the state and religion.

The foregoing analysis indicates that the Good Friday holiday was enacted for a secular purpose, has a primarily secular effect, and does not result in excessive entanglement. Accordingly, this court concludes that

Hawaii Rev. Stat. § 8-1 is compatible with the requirements of the Constitution as set out in the *Lemon* test.

5. The Similarity of Thanksgiving, Christmas, and Good Friday

This court has concluded above that the establishment of Good Friday as a legal holiday by Hawaii's legislature is permissible under the *Lemon* test. This conclusion is buttressed by this court's further finding that Good Friday shares characteristics with Thanksgiving and Christmas which render the Good Friday holiday constitutionally permissible under *Lynch*. In *Lynch*, the Supreme Court found that Thanksgiving was traditionally "celebrated as a religious holiday" and that "[t]hat holiday has not lost its theme of expressing thanks for Divine aid any more than has Christmas lost its religious significance." *Id.* at 1360. Having found that Thanksgiving and Christmas were days of "religious significance," the Court went on to find that the traditional public holidays falling on those days were not offensive to the First Amendment. *Id.* at 1360-61, 1378-79 (Brennan, dissenting). As noted above by the Court in *Lynch*, "the Government has long recognized – indeed it has subsidized – holidays with religious significance." *Lynch*, 104 S.Ct. at 1361.

Language from Justice Brennan's dissenting opinion in *Lynch* is illuminating with respect to government's ability to recognize the sanctity of a religious day within the boundaries prescribed by the First Amendment. Justice Brennan wrote that

> "although the government may not be compelled to do so by the Free Exercise Clause, it may, consistently with the Establishment Clause, act to accommodate to some extent the opportunities of individuals to practice their religion . . . [G]overnment does not violate the Establishment Clause when it simply chooses to 'close its doors or suspend its operations as to those who want to repair to their religious sanctuary for worship or instruction.' "

Lynch 104 S.Ct. at 1381 (Brennan, dissenting), *citing Schempp*, 83 S.Ct. at 1610-12 (Brennan, concurring), *Zorach v. Clauson*, 72 S.Ct. 679, 684 (1952). Justice Brennan went on to opine that the foregoing principle justified "government's decision to declare December 25th a public holiday." *Id.*

The similarity in the characters of Thanksgiving, Christmas, and Good Friday is clear. All three holidays are intertwined with the history of our nation. Indeed, Christmas and Good Friday have histories of their own which far exceed in their scope the history of this country; the two days mark the birth and death of Jesus Christ and have been observed for centuries. As this court has noted above, Good Friday, while religious in its origins, has, like Christmas, attained a partially secular character revolving around traditional Spring celebrations. Thus, this court concludes that Good Friday and Christmas stand on equal footing before the First Amendment. Christmas celebrates the birth of Christ, whereas Good Friday commemorates Christ's crucifixion. Both Christmas and Good Friday have been traditionally celebrated and acknowledged as religious holy days by the

Western world for many centuries. The partial secularization of the two holidays is somewhat parallel in that the days have come to signify the advent of seasonal commercial sales, an opportunity to relax with family, and the occasion to engage in traditional seasonal celebrations. Justice Brennan wrote that

> "[w]hen government decides to recognize Christmas Day as a public holiday, it does no more than accommodate the calendar of public activities to the plain fact that many Americans will expect on that day to spend time visiting with their families, attending religious services, and perhaps enjoying some respite from preholiday activities. The Free Exercise Clause, of course, does not necessarily compel the government to provide this accommodation, but neither is the Establishment Clause offended by such a step.

Lynch, 104 S.Ct. at 1379 (Brennan, dissenting). What Justice Brennan wrote about Christmas appears to this court to apply with equal force to Good Friday. Each holiday provides Americans with a day off from work and neither holiday calls for the state's administrative involvement in or supervision of the church's affairs.

Thus, the obvious similarities which exist between Thanksgiving, Christmas, and Good Friday insulate the Good Friday holiday from a successful First Amendment challenge. The Supreme Court's holding that Thanksgiving and Christmas, while religiously significant, are nevertheless constitutionally inoffensive as public holidays, mandates that this court similarly find that the Good Friday holiday is constitutionally permissible. The

McGowan decision counsels that traditional public holidays which are also religiously significant days may, through the passage of time, partially lose their sectarian nature and become constitutionally permissible, regardless of legislative intent in establishing those holidays. Good Friday in Hawaii, whatever its intended purpose, has become a traditional and uniform day of rest and relaxation for the citizens of the State. Accordingly, the holiday does not offend either the United States Constitution or the Hawaii Constitution.

V.

Conclusion

To summarize, this court finds that the primary purpose of the statute which established Good Friday as a legal holiday was to increase the number and frequency of legal holidays in the Territory. This purpose is clearly secular. The court also finds that the primary effect of the statute is secular. The Good Friday holiday allows the people of Hawaii to play or to pray as they see fit. Even the plaintiffs concede that many more people can be found in Hawaii's parks and shopping malls on Good Friday than can be found in its churches. Finally, this court finds that the enactment of the antecedent to Hawaii Rev. Stat. § 8-1 has not led to excessive entanglement between religion and the state.

Moreover, this court's finding that Good Friday is similar in nature to Thanksgiving and Christmas provides additional ground for insulating the Good Friday holiday from a successful constitutional challenge. Just as Christmas and Thanksgiving are permissible because of

their partially secular observations and because they provide a uniform day of rest and relaxation for Americans, Good Friday has attained a secular position in this nation's traditional fabric and provides citizens of Hawaii with a uniform day of rest.

For the foregoing reasons, the plaintiffs' motion for partial summary judgment with respect to the constitutionality of Hawaii Rev. Stat. § 8-1 is denied, and the defendants' motion for summary judgment with respect to the constitutionality of Hawaii Rev. Stat. § 8-1 is granted. The statutory establishment of Good Friday as a legal holiday offends neither the United States nor the Hawaii Constitutions.

Having concluded that Hawaii Rev. Stat. § 8-1 is constitutionally permissible, this court finds no basis to conclude that the collective bargaining agreements between public employees and their employers which establish Good Friday as a paid leave day, either expressly or through incorporation of Hawaii Rev. Stat. § 8-1, are in any way violative of the United States or Hawaii Constitutions. Accordingly, the plaintiffs' motion for partial summary judgment with respect to the constitutionality of the collective bargaining agreements is denied, and the defendants' motion for summary judgment with respect to the collective bargaining agreements is granted.

SO ORDERED.

APPENDIX C

FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

NELL A. CAMMACK; GENIE LUCAS; DOUGLAS PAUL ROOT; CAROLYN L. STAPLETON; MICHELE WALLACE, *Plaintiffs-Appellants,* v. JOHN W [SIC]. WAIHEE, in his capacity as Governor of the State of Hawaii; ALFRED LARDIZABAL, in his capacity as Director of Personnel Services of the State of Hawaii; FRANK F. FASI, in his capacity as Mayor of the City & County of Honolulu; JEREMY HARRIS, in his capacity as Managing Director of the City & County of Honolulu; Loretta K. Fukuda, in her capacity as the Director of Civil Service of the City & County of Honolulu; UNITED PUBLIC WORKERS, LOCAL 646, AFSCME; [HAWAII GOVERNMENT EMPLOYEES' ASSOCIATION, LOCAL 152, AFSCME;] HAWAII STATE TEACHERS ASSOCIATION; UNIVERSITY OF HAWAII PROFESSIONAL ASSEMBLY; HAWAII FIRE FIGHTERS ASSOCIATION, LOCAL 1463, IAFF; STATE OF HAWAII ORGANIZATION OF POLICE OFFICERS, *Defendants-Appellees.*	No. 87-15073 D.C. No. CV-87-0260-ACK ORDER AND DISSENTS

Filed August 13, 1991

Before: Dorothy W. Nelson, Diarmuid F. O'Scannlain and Stephen S. Trott, Circuit Judges.

ORDER

A majority of the panel has voted to deny the petition for rehearing and to reject the suggestion for rehearing en banc. Judge D.W. Nelson would grant the petition for rehearing and accept the suggestion for rehearing en banc.

The full court has been advised of the en banc suggestion. An active judge called for an en banc vote, and a majority of the active judges of the court has voted to reject the suggestion for rehearing en banc. Fed. R. App. P. 35.

The petition for rehearing is DENIED and the suggestion for rehearing en banc is REJECTED.

DISSENTS

REINHARDT, J., with whom HUG, PREGERSON, POOLE AND NORRIS, JJ, join dissenting from the denial of rehearing en banc.

For the first time, a court has held that a purely religious holy day may be made an official state holiday. Good Friday, the annual date on which Western Christians commemorate the crucifixion of Jesus Christ, is by law a public holiday in Hawaii. State and local government offices are closed and most public employees

receive paid leave. By making Good Friday a public holiday, the Hawaii statute officially consecrates that event. It incorporates a purely religious holy day into the state calendar and says to those not of the majority religion: "Thou shalt celebrate this religious occasion." By doing so, the state of Hawaii establishes religion in violation of the Constitution. Nevertheless, by a 2-1 vote, a panel of this court found the Hawaii statute constitutional. Our refusal to reconsider the decision en banc substantially undermines one of the First Amendment's most critical provisions.

It is not surprising that the Hawaii legislature selected Good Friday rather than, say, Yom Kippur or Ramadan as the date for its additional state holiday. Good Friday is after all the holy day celebrated by members of the majority religion in this country. There are many reasons to be concerned when the government seeks to clothe itself in the religious ritual of the majority, not the least of which is the effect upon those with different views. By consecrating a Christian holy day, the Hawaii legislature has effectively sent the rest of the population a message. That message is not only that the state officially recognizes the religious preference of the majority, but more important, that the state considers the beliefs of those in the minority to be unworthy of similar respect.[1]

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[1] "Endorsement sends a message to nonadherents that they are outsiders, not full members of the political community, and an accompanying message to adherents that they are insiders, favored members of the political community." *Lynch v. Donnelly*, 465 U.S. 668, 689 (1984) (O'Connor, J., concurring).

While official recognition of any or all religions is prohibited by the constitution, the preference of the majority religion over all others is certainly among the principal offenses the first amendment condemns.

Additionally troubling is the impact this message will have on children for whom school is closed on Good Friday. How can parents forthrightly explain to their children the reasons for the official school holiday except by stating that it commemorates the crucifixion of Jesus Christ? Such an explanation is sure to arouse feelings of discomfort, of differentness, of isolation from their teachers and classmates in nonChristian school children, who are even more susceptible to feelings to social alienation than are their parents. *See Edwards v. Aguillard*, 482 U.S. 578, 584-85 (1987); *School District of Abington Township v. Schempp*, 374 U.S. 203, 289-290 (1963) (Brennan, J., concurring). It is unfortunate that, still today, so many adherents of the majority religion fail to comprehend the psychological effect that the state's endorsement of that religion has upon children whose views and upbringings differ from their own.

Our refusal to grant en banc consideration is disturbing for other reasons as well. The significance of our decision in this case goes beyond the issue of religion. The majority opinion reflects a growing willingness to accept the imposition of majoritarian control at the expense of individual rights. Ours is a heterogeneous society in which tolerance of different ideologies and views has historically been enforced and encouraged through the first amendment. Yet in recent years we have witnessed increasing legislative restrictions on individual

freedom in laws regulating religious practice, sexual conduct, and nonobscene expression. And we have witnessed an increasing willingness on the part of the judiciary to allow the social, moral, and cultural precepts of the majority to dictate the choices available to those with different views.

We are creeping closer and closer to a state-imposed orthodoxy – an orthodoxy firmly outlawed by a Bill of Rights that the courts are supposed to enforce with vigilance. Our ruling upholding the official consecration of Good Friday is an unfortunate step toward that state of orthodoxy, toward the establishment of an officially preferred ideology governing the views and conduct of all Americans. While the sanctioning of an official religious holiday may appear to be only a minor Constitutional violation, every measure by which the majority is enabled to exert dominion over the personal beliefs and values of the minority does serious injury to our fundamental liberties.[2]

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[2] The playwright Arthur Miller has warned that

> [p]eople ought to ask themselves why such good men as Washington, Jefferson and the rest took such explicit steps to keep praying out of politics. It was to spare America the inevitable misuse of religiosity-by-government that had helped to fasten tyranny on Europe. . . . For the United States to take a single step down that road is not merely folly but a destruction of policy that has worked beautifully for two centuries and has attracted the respect and envy of persecuted religious people everywhere in the world.

A. Miller, "School Prayer: A Political Dirigible," N.Y. Times, March 12, 1984, at A17, col. 1.

The decision which we refuse to consider en banc is clearly contrary to existing legal doctrine. As the following brief review of the central legal issues demonstrates, the Hawaii law violates both the "purpose" and "effect" prongs of the *Lemon* test. *See Lemon v. Kurtzman*, 403 U.S. 602 (1971). However, the majority opinion does not merely misapply the law; it creates a substantially weaker Establishment Clause jurisprudence in our circuit. It is particularly unfortunate that, at a time when official tolerance for minority views is decreasing, our court is not even willing to pause momentarily in order to reflect en banc before joining the rush toward unrestrained majoritarianism.

I

Purpose

As the majority opinion recognizes, a necessary condition for upholding a statute challenged on Establishment Clause grounds is that the statute have "a secular legislative purpose." Slip op. at 10864 (quoting *Lemon*, 403 U.S. at 612). The majority contends that the purpose of the statute at issue is "to provide Hawaiians with another holiday." Slip op. at 10873. This is undeniably a secular purpose; however, it constitutes an incomplete and highly misleading description of the purpose of the Hawaii statute.

Further, the majority assumes that a statute need only have *a* secular purpose. In fact, that is not enough. A careful analysis of the Supreme Court's decisions concerning the purpose prong of *Lemon* demonstrates the majority's error. As Justice O'Connor stated, in the course

of casting the crucial fifth vote, the purpose prong "is not satisfied . . . by the mere existence of some secular purpose, however dominated by religious purposes." *Lynch*, 465 U.S. at 690-91 (O'Connor, J., concurring). If a principal purpose is to further religion, the statute is void.

That *any* secular purpose is insufficient under *Lemon* is clear from the fact that *every* statute can be described in such a way that it includes a secular purpose. For example, if a public school were to offer a course in which students were instructed to read the Bible not as literature but as the revealed word of God, it could be said that *a* purpose of the practice is to foster literacy. As a factual matter this might well be correct. The School Board may have decided that it is important for the students' minds that they read books, and that it is important for their immortal souls that one of the books they read be the Bible. Thus, the Bible-reading has a secular purpose (literacy) as well as a religious purpose. However, the secular purpose is wholly irrelevant to the real issue the court must determine. From a constitutional standpoint, the question is: having decided that students should read books, was there a legitimate secular purpose behind the *further* decision that the students should read the Bible? Similarly, if a state passed legislation requiring the erection at every other street corner of a pole containing a stop sign with the word "STOP" and a picture of Jesus Christ in the background, there is no doubt that a purpose of the statute would be to regulate the flow of traffic and require vehicles to stop. However, from a constitutional standpoint, the question that would have to be asked is: why the picture of Jesus Christ? Is the purpose of requiring the picture to be on the sign secular? In the

case before us, the question is: *having decided that Hawaiians should have another holiday, was there a legitimate secular purpose behind the legislature's further decision to select Good Friday as that holiday*? The majority in *Cammack* fails to ask that fundamental question.

To put it another way, what the majority should have recognized is that the purpose of a law selecting a particular day for an additional holiday necessarily includes the purpose behind the selection of that particular day. That the Hawaii legislature wanted to create another holiday is an incomplete description both of the statute and of its purpose. In determining statutory purpose, we must consider all essential elements of the statute, not just those of secular origin. A full and fair description of the Hawaii statute leads to the inexorable conclusion that a primary purpose underlying its enactment was to foster the observance of religion; accordingly, the statute fails the first prong of the *Lemon* test.

Although the majority fails to ask the right question, – why Good Friday? – it does provide what appears to be its answer to that inquiry. The opinion argues that the decision to select Good Friday was in fact motivated by calendar concerns, i.e., that Good Friday happened to be a convenient date for another holiday. Remarkably, as support for this conclusion, the majority cites the legislative history, which states clearly that the supporters of the bill that made Good Friday a legal holiday believed that Good Friday, as "a day of solemn religious observance by the members of the various churches and religious denominations[,] should be given legal sanction." Slip op. at 10869-70. The opinion in fact points to no evidence that calendar concerns motivated the selection

of Good Friday as a legal holiday, *see* Slip op. at 10885-87 (Nelson, D.W., dissenting). Indeed, it would be difficult to imagine a *less* appropriate holiday to select on the basis of "calendar" concerns, since Good Friday does not occur on a fixed date or even in the same month each year. Rather, it is defined – pursuant to ecclesiastical law – as the Friday preceding the first Sunday after the first full moon after the vernal equinox. *Random House College Dictionary* 416, 568 (rev. ed. 1980).

The majority also suggests that the purpose of selecting Good Friday as an official holiday was to accommodate the religious needs of many of its people. It is worth noting that this suggestion further belies the notion that Good Friday was merely a convenient date for a holiday. Moreover, the justification fails on its own terms. In the context of the Court's Establishment Clause jurisprudence, accommodation of religion means the lifting of government-imposed burdens on the free exercise of religion. *See, e.g., Hobbie v. Unemployment Appeals Comm'n,* 480 U.S. 136, 144-45 (1987). If the statute at issue required that state and local employees who wished to celebrate Good Friday be *permitted* not to work on that day, then it could be characterized as accommodation. However, it *mandates* that the government close down. This is not accommodation, but establishment.

II

ENDORSEMENT

A statute which signifies official endorsement of religion violates the effects prong of *Lemon, Lynch,* 465 U.S. at 692 (O'Connor., J., concurring). The focus of the inquiry is

on the message the statute communicates. Here, that message is unmistakable. Good Friday is a wholly sectarian holiday. By contrast with Sunday, Thanksgiving, and Christmas – each of which has come to have secular significance – there is no recognizable secular tradition surrounding Good Friday. While non-believers may associate Sundays with recreation, Thanksgiving with eating turkey, and Christmas with sending and receiving gifts and greeting cards, one is hard-pressed to come up with any analogous practices associated with Good Friday. Good Friday connotes the Crucifixion – and nothing else.

Two state courts have considered the argument that Good Friday, like Sunday, Thanksgiving and Christmas, has developed into a secular holiday. Both squarely rejected this contention. As the Connecticut Supreme Court stated, "the passage of time has not converted Good Friday into a secular holiday or freed it of its clearly religious origins." *Griswold Inn, Inc. v. Connecticut*, 183 Conn. 552, 441 A.2d 16, 21 (1981). In striking down an official Good Friday holiday, the California Court of Appeal agreed, observing that "there is no evidence in the present case that the Christian holy day of Good Friday has become secularized in any degree during the course of its longtime observance by Christian sects." *Mandel v. Hodges*, 54 Cal. App. 3d 596, 612, 127 Cal. Rptr. 244, 254 (1976). While no federal court has directly faced the question presented by this case,[3] every state court to

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[3] In the context of an Establishment Clause challenge to a different practice, one district court has remarked that Good Friday should be classified among those "holidays with a

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have considered an Establishment Clause challenge to state actions investing Good Friday with legal significance has found a constitutional violation. *See id.* (invalidating executive order granting three hours of paid leave for state employees on Good Friday); *Griswold Inn* (invalidating prohibition of liquor sales on Good Friday); *Samuels v. Oberly*, No. 83M-JN-16 (Del. Super. Ct. February 7, 1984) (unpublished opinion) (same).[4]

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purely religious significance." *Florey v. Sioux Falls School Dist.*, 464 F. Supp. 911, 915 (D.S.D. 1979), *affirmed by* 619 F.2d 1311 (8th Cir.), *cert. denied*, 449 U.S. 987 (1980).

[4] Some state courts have upheld terms in collective bargaining agreements making Good Friday a holiday, not on the theory that Good Friday is a secular holiday but because, in the view of those courts, the designation of the day as a holiday was not attributable to state action. *See California School Employees Ass'n v. Sequoia Union High School Dist.*, 67 Cal. App. 3d 157, 136 Cal. Rptr. 594 (1977); *Americans United for Separation of Church and State v. Kent County*, 97 Mich. App. 72, 293 N.W.2d 723 (1980). In addition, one federal district court has upheld a Good Friday holiday that was the result of a negotiated contract with a labor union. *See Franks v. Niles*, 29 Fair. Empl. Prac. Cas. (BNA) 1114, 30 Empl. Prac. Dec. (CCH) 33,297 (N.D. Ohio 1982). In the case before us, the unions argue that even if we were to reverse the majority's decision with respect to the statutory Good Friday holiday, our decision would have little practical effect because much of what the statute accomplishes is duplicated in collective bargaining agreements.

The Supreme Court's most recent opinion concerning state action seriously undermines the decisions holding that a state's agreement to a term in a contract does not constitute state action. *Edmonson v. Leesville Concrete Co., Inc.*, 59 U.S.L.W. 4574, 4576 (1991), holds that a judge's role in supervising the exercise of peremptory challenges by private litigants constitutes

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The majority attempts to show that non-believing Hawaiians have come to view Good Friday as a popular shopping day. That may well be true. People tend to shop on holidays when stores remain open. However, whatever incidental association of Good Friday with shopping may exist falls far short of the sort of independent secular tradition that justifies Sunday, Thanksgiving and Christmas holidays. *See Lynch*, 465 U.S. at 685 ("That the display brings people into the central city, and serves commercial interests and benefits merchants and their employees, does not . . . determine the character of the display."). Even the majority recognizes that the Good Friday holiday cannot be justified on the basis of long tradition. *See* slip op. at 10863 (distinguishing *March v. Chambers*, 463 U.S. 783, 786 (1983), which upheld Nebraska's practice of opening the state legislature's sessions with a prayer on the basis of a "deeply embedded" historical tradition). Thus, the Sunday, Thanksgiving, and Christmas analogies are inapplicable, even under the majority's analysis.

As Justice Holmes told us, the life of the law has been "experience." I doubt that there is a person among us

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"significant participation of the government," and therefore justifies a finding of state action. It appears to follow *a fortiori* that a state's *agreement* to a term in a contract is also state action.

In any event, in the present case, the majority did not rest its decision on the basis of any supposed absence of state action. Rather, it recognized that Hawaii's statutory designation of Good Friday as a public holiday was state action, but found that action consistent with the Establishment Clause.

who is good conscience could say that Good Friday has taken on the same type of secular meaning, commonality, and acceptability as Sunday, Thanksgiving, or Christmas. In fact, there can be no doubt that Good Friday is a solemn religious occasion, pure and simple, and marks one of the holiest moments of a particular religious faith. That is the occasion which Hawaii has chosen to consecrate and on which it has placed the official endorsement of the state.

III

At one time in our nation's history, laws making Sunday and Christmas official holidays had purely religious purposes and effects. Had someone challenged such laws under the Establishment Clause during the infancy of the Republic, and had the Supreme Court of that era applied our modern jurisprudence, the laws might well have been struck down and the secular traditions never developed. However, such challenges were not brought and the secular traditions did develop. As the majority recognizes, we must interpret the Establishment Clause in light of that reality. *See McGowan v. Maryland*, 366 U.S. 420, 445 (1961) (noting the irrelevance of the religious origins of a Sunday closing law where Sunday had taken on secular significance). Yet the majority fails to recognize a necessary corollary of the *McGowan* principle. Where, as here, no independent secular tradition yet exists, the law cannot be justified on the basis of the hypothesis that such a tradition might eventually develop.

In any event, it is difficult to imagine that those to whom Good Friday is a sacred day would particularly relish the prospect of its coming to be known as a public holiday like any other – i.e., as a day commemorated largely by sporting events and appliance sales. Indeed, the Establishment Clause serves in part to protect the religious realm from the secular. *See* L. Tribe, *American Constitutional Law*, 1171 & n.14 (2d ed. 1988) (discussing, *inter alia*, the views of Roger Williams). Distorting the First Amendment in order to allow a state to make a religious occasion an official holiday benefits no one, not even those who hold Good Friday sacred.

In the opinion we refuse to reconsider, the majority makes a number of additional errors, each of which is ably discussed in Judge D.W. Nelson's excellent dissenting opinion. I shall not repeat that discussion here. I simply close by noting that today we not only condone the abandonment of sound constitutional principles of long-standing duration, but we take one further step down the path of majoritarian control of the lives and beliefs of all our citizens.[5]

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[5] Almost fifty years ago, Justice Jackson wrote that "[i]f there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism religion, or other matters of opinion or force citizens to confess by word or act their faith therein." *West Virginia Board of Educ. v. Barnette*, 319 U.S. 624, 642 (1943). Though time may have made these words trite, it surely has not made them any less true.

PREGERSON, Circuit Judge,dissenting from the denial of rehearing en banc.

I join in Judge Reinhardt's compelling dissent from the denial of rehearing en banc. We all need to bear in mind the wise words of Mr. Justice Black: "[T]he only way to protect minority religious groups from majority groups in this country is to keep the wall of separation between church and state high and impregnable as the First and Fourteenth Amendments provide." *Board of Educ. of Cent. School Dist. No. 1 v. Allen*, 392 U.S. 236, 254 (1968) (Black, J., dissenting).

KOZINSKI, Circuit Judge, dissenting from the denial of rehearing en banc.

The three carefully crafted opinions in this case illustrate well the shortcomings of the *Lemon* test. In any event, I believe that Judge Reinhardt's dissent raises concerns of sufficient magnitude to warrant en banc consideration of this important case of first impression.

APPENDIX D

Hawaii Revised Statutes section 8-1 provides:

§ 8-1 Holidays designated. The following days of each year are set apart and established as state holidays:

The first day in January, New Year's Day;

The third Monday in January, Dr. Martin Luther King, Jr., Day;

The third Monday in February, Presidents' Day;

The twenty-sixth day in March, Prince Jonah Kuhio Kalanianaole Day;

The Friday preceding Easter Sunday, Good Friday;

The last Monday in May, Memorial Day;

The eleventh day in June, King Kamehameha I Day;

The fourth day in July, Independence Day;

The third Friday in August, Admission Day;

The first Monday in September, Labor Day;

The eleventh day in November, Veterans' Day;

The fourth Thursday in November, Thanksgiving Day;

The twenty-fifth day in December, Christmas Day;

All election days, except primary and special election days, in the county wherein the election is held;

Any day designated by proclamation by the President of the United States or by the governor as a holiday.